TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

No. 366.

HOMER BIRD, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

FILED APRIL 24, 1903.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 306.

HOMER BIRD, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

INDEX.

	Original.	Print.
Caption	1	1
Indictment	2	1
Judgment and sentence	3	2
Mandate of Supreme Court of the United States	4	2
Order granting new trial	6	4
Motion for order for attachment	6	4
Order for attachment	8	5
Order setting cause for trial	9	5
Motion for continuance	9	5
Order taking motion for continuance under advisement	12	7
Order denying motion for continuance	13	8
Order postponing trial	13	8
Service of list of jurors	14	9
Motion to dismiss for want of jurisdiction	14	9
Order overruling motion to dismiss, etc	15	9
Drawing of jury	15	9
Hearing commenced	17	10
Hearing continued	17	10
Verdict	18	11
Order denying motions for new trial and in arrest of judgment	18	11
Judgment and sentence	19	12
Order allowing bill of exceptions	21	13

27872—02——0

	Original.	Print.
Bill of exceptions	22	13
Clerk's certificate as drawing of jurors	22	13
Motion to dismiss	23	14
Testimony of Charles Sheffler	23	14
Naomi Strong	127	73
C. L. Vawter	179	103
Government rests	185	106
Testimony of Homer Bird	186	107
Rev. Condit	231	133
A. K. Delaney	236	135
Homer Bird (recalled)	240	137
H. J. Gurr	242	138
Defendant rests	247	141
Testimony of C. L. Vawter (recalled)	248	141
Charles Sheffler (recalled)	251	142
Naomi Strong (recalled)	253	144
F. D. Kelsey	256	145
Government rests	259	147
Evidence closed	259	147
Charge to the Jury	260	147
Defendant's requests for instructions	274	155
Motion in arrest of judgment	281	159
Motion for new trial	283	160
Judge's certificate to bill of exceptions	297	169
Petition for writ of error	298	170
Assignment of errors	299	170
Order granting writ of error, etc	313	177
Clerk's certificate	314	178
Writ of error	315	178
Citation	318	179

1 UNITED STATES OF AMERICA,
District of Alaska, ss:

In the United States district court for the district of Alaska, Div. No. 1.

THE UNITED STATES OF AMERICA
vs.
HOMER BIRD. } No. 1327.

Indictment, former judgment, mandate, order granting a new trial, and pleas and proceedings begun and held in the above-entitled cause at the regular December, A. D. 1901, term of the above court at Juneau, beginning on the 2d day of December, A. D. 1901, and ending on the 29th day of March, 1902. Present, the Hon. M. C. Brown, judge; James M. Shoup, United States marshal; Robert A. Friedrich, United States attorney; W. J. Hills, clerk, and others.

2 UNITED STATES OF AMERICA,
District of Alaska, ss:

In the district court of the United States, in and for the district aforesaid, at the adjourned Nov. term thereof, A. D. 1899, begun and held at Juneau, in said district, commencing on the 7th day of November, 1899.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oath present, that Homer Bird on the 27th day of September, in the year 1898, in said district, and within the jurisdiction of said court, at or near a point on the Yukon River called Slaughterhouse Gulch, about two miles below Camp Dewey and about eighty-five miles above Anvik, committed the crime of murder. Committed as follows: The said Homer Bird, at a point on the Yukon River called Slaughterhouse Gulch, about eighty-five miles above Anvik, within the said district of Alaska, and within the jurisdiction of this court, on the twenty-seventh day of September, one thousand eight hundred and ninety-eight—said district had been before the said twenty-seventh day of September in the year last mentioned ceded to the United States, and was on the last mentioned day then and there under the sole and exclusive jurisdiction of the United States—did then and there purposely, and of his deliberate and premeditated malice aforethought, knowingly, willfully, unlawfully, and feloniously, in and upon the body of one J. H. Hurlin, a person in being, did make an assault with a certain double-barrel shotgun, then and there charged with gunpowder and leaden bullets, which the said Homer Bird had and held in his hands, and the said Homer Bird then and there, purposely, knowingly, unlawfully, and of his deliberate and premeditated malice, discharge and shoot off, to, against, and upon the said J. H. Hurlin and that the said Homer Bird, with the bullets aforesaid, out of the shotgun aforesaid, then and there, by the force of the gunpowder shot off as aforesaid, then and there feloniously, purposely, willfully, unlawfully, knowingly, and of his deliberate and premeditated malice, did strike, penetrate, and wound the said J. H. Hurlin in and upon the left side

of the head and neck of him the said J. H. Hurlin, giving to
3 him, the said J. H. Hurlin, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the shotgun aforesaid, by the said Homer Bird, in and upon the left side of the head and neck of him the said J. H. Hurlin, a mortal wound, of which said mortal wound, inflicted so as aforesaid, the said J. H. Hurlin did, on the said 27th day of September, 1898, die.

And so, the grand jurors, duly selected, impaneled, sworn, and charged as aforesaid, upon their oaths do say, that the said Homer Bird, him the said J. A. Hurlin did then and there and in the manner and form aforesaid, purposely, feloniously, unlawfully, willfully, knowingly, and of his deliberate and premeditated malice aforethought, kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

ROBT. A. FRIEDRICH,
United States Attorney.

(Endorsed:) Original, No. 1327. District court United States, district of Alaska. The United States vs. Homer Bird (murder), indictment. A true bill, W. C. Pedlar, foreman. Witesses examined before the grand jury in session: 1, Chas. Sheffler; 2, Wallace Blaine; 3, Naoma Strong; 4, Dr. Martine S. Burns; 5, Cornelius Vawter. Filed, Nov. 9, 1899. Albert D. Elliot, clerk. Robt. A. Friedrich, U. S. attorney.

THE UNITED STATES OF AMERICA
vs.
HOMER BIRD. } No. 1327. Judgment and sentence.

This day having been heretofore fixed by the court as the day upon which judgment and sentence would be rendered against said defendant, Homer Bird, upon the verdict of the jury heretofore duly returned, whereby said defendant was and is found guilty of the crime of murder as charged in the indictment herein, and without any qualification of said verdict, the defendant being present in person, and by his attorneys, Messrs. Malony & Cobb; and the United States being represented by
Robert A. Friedrich, esq., present United States attorney for
4 this district; and a motion for a new trial having been duly argued, submitted, and overruled by the court, the court asked the defendant if he had anything to say why judgment and sentence should not now be pronounced against him, and the court being fully advised in the premises:

It is now considered and adjudged, and it is the judgment and sentence of the court that the defendant, Homer Bird, be taken hence by the United States marshal for this district to the jail or penitentiary at Sitka, Alaska, and there confined and safely kept until Friday, the ninth day of February, in the year of our Lord one thousand nine hundred, and that on said Friday, the ninth day of February, nineteen hundred, he, the said defendant, be taken by the United States marshal of said district to some suitable place, to be designated by said marshal, within said or the enclosure thereof, and at such hour as said marshal shall designate on said day, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, be hanged by the neck until

he is dead. The due execution of this judgment and sentence shall be in all things conducted in accordance with the provisions of the law relating thereto, and a warrant for the execution of the same shall duly issue to said marshal. (To which said judgment and sentence defendant duty excepts.)

Dated December 13th, 1899.

CHARLES S. JOHNSON,
United States District Judge for the District of Alaska.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the district court of the United States for the district of Alaska, greeting:

Whereas, lately in the district court of the United States for the district of Alaska before you, in a cause between the United
5 States, plaintiff, and Homer Bird, defendant, wherein the judgment of the said district court, entered in said cause on the 13th day of December, A. D. 1899, is in the following words, viz:

"This day having been heretofore fixed by the court as the day upon which judgment and sentence would be rendered against said defendant, Homer H. Bird, upon the verdict of the jury, heretofore duly returned, whereby said defendant was and is found guilty of the crime of murder, as charged in the indictment herein, and without any qualification of said verdict, the defendant being present in person and by his attorneys, Messrs. Malony & Cobb, and the United States being represented by Robert A. Friedrich, esq., present U. S. attorney for this district; and a motion for a new trial having been duly argued, submitted, and overruled by the court, the court asked the defendant if he had anything to say why judgment and sentence should not now be pronounced against him; and the court being fully advised in the premises,

"It is now considered and adjudged, and it is the judgment and sentence of the court, that the defendant, Homer Bird, be taken hence by the United States marshal for this district to the jail or penitentiary at Sitka, Alaska, and there confined and safely kept until Friday, the ninth day of February, in the year of our Lord one thousand nine hundred; and that on said Friday, the ninth day of February, nineteen hundred, he, the said defendant, be taken by the United States marshal of said district to some suitable place, to be designated by said marshal, within said jail or the inclosure thereof, and at such hour as said marshal shall designate on said day, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, hanged by the neck until he is dead. The due execution of this judgment and sentence shall be in all things conducted in accordance with the provisions of the law relating thereto, and a warrant for the execution of the same shall duly issue to said marshal.

"Dated December 13, 1899.

"CHARLES S. JOHNSON,
"*United States District Judge for the District of Alaska.*"

as by the inspection of the transcript of the record of the said district court, which was brought into the Supreme Court of the United States

by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said district court with directions to set aside the verdict and award a new trial.

6 FEBRUARY 25, 1901.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and judgment of this court as according to right and justice, and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of March, in the year of our Lord one thousand nine hundred and one.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) Supreme Court of the United States. No. 278. October term, 1900. Homer Bird vs. United States. Mandate. Filed Mar. 29, 1901. W. J. Hills, clerk.

Wherefore, it is ordered and adjudged by the court that the verdict, judgment, and sentence in the above cause be, and the same is, set aside and a new trial is hereby granted to the defendant in accordance with the mandate of the Supreme Court above set aforth.

M. C. BROWN, *Judge.*

UNITED STATES *vs.* HOMER BIRD. } No. 1327.

Now comes the defendant, by his attorney, and in his own proper person, and moves the court to order that an attachment issue herein for the following-named witnesses, to wit: M. C. Jensen, John Thompson, John Doe Wallace, John Chapman, John Doe Hendrix, and Jim Helm, and for cause shows:

That the testimony of said witnesses is material to his defense herein, as is fully shown in the affidavit for a subpœna for said witnesses, filed herein at the last May term of this court, at Juneau, which is here referred to and made a part hereof.

7 That pursuant to an order of this court made at the May term, a subpœna was duly issued for said witnesses, directed to the U. S. marshal for Alaska, division No. 2, wherein said witnesses reside, and a certified copy of said order was attached to and sent with said subpœna.

That at the same time defendant's counsel wrote to the said marshal informing him that the witnesses John Thompson, John Doe Wallace, and John Doe Kendrix were residing on the Yukon River, at Camp Dewey, about eighty miles above Anvik, and that John Chapman was a resident of and a missionary at Anvik, which is about six hundred miles from St. Michaels, on the Yukon River.

That said subpœna, as shown by the return thereon, was received by the said marshal on the 17th day of September, 1901, and was served on the said M. C. Jensen, at Nome, on the 20th day of September, 1901.

That said M. C. Jenson has so far failed and neglected to obey said subpœna and appear here at this term of court, as therein commanded.

That said marshal returned said subpœna not served upon the other witnesses therein named, because not found, reference is here made to said return for all the particulars thereof. That said subpœna was returned as appears by the date thereof on the 24th day of September, 1901, and defendant believes and alleges the facts to be that from the date of the receipt thereof on the 17th day of September, 1901, until the date of the return thereof, said marshal did not make any effort to find said witnesses at the places where they were shown to be, viz, at Camp Dewey, on the Yukon River, and at Anvik, on the Yukon River.

That defendant has no knowledge or information whatever as to why the said M. C. Jensen has failed to obey said subpœna, or as to why said marshal made no effort to serve the same on the other said witnesses.

And further deponent saith not.

A. H. BIRD.

Subscribed and sworn to before me this 23 day of October, 1901.

W. J. HILLS, *Clerk.*

(Endorsed:) No. 1327. United States *vs.* Homer Bird. Filed Oct. 23, 1901. W. J. Hills, clerk.

8 UNITED STATES *vs.* HOMER BIRD. } No. 1327. Order.

Upon the hearing of the application of the defendant, defendant being present in court in the custody of the United States marshal and represented by his counsel; the United States being represented by Robert A. Friedrichs, United States attorney; it is ordered by the court that attachment issue by the clerk of this court for the arrest of M. C. Jensen, that he brought before this court to show cause why he should not be punished for contempt in disobeying subpœna of this court duly served upon him commanding him to appear as a witness on the part of the defendant herein on the 7th day of October, 1901.

Dated October 23d, 1901.

9 TUESDAY, *December 3d, 1901.*

UNITED STATES *vs.* HOMER BIRD. } No. 1327. Order.

And now, on this day, on application of the U. S. attorney, defendant being present in court in custody of the U. S. marshal, and being repre-

sented by counsel, no objection being made thereto, it is ordered that this cause be set down for trial December 17th, 1901.

UNITED STATES OF AMERICA
vs.
HOMER BIRD. } No. 1327.

Now comes the defendant, in his own proper person and by his attorneys, and says he can not safely go to trial at this time for want of testimony of the following-named witnesses, to wit, M. C. Jensen, John Doe Wallace, John Doe Hendricks, John Thompson, and John Chapman.

That the testimony of all said witnesses is material to the defense herein, in the following particulars, to wit:

That the witnesses for the Government will testify, and the theory of the case for the Government will be:

That the crime for which the defendant stands charged was committed on the Yukon River, at a point about eighty miles above Anvik and about one mile below a coal mine called Camp Dewey, on the morning of the 27th day of September, 1898, in the following manner, substantially:

That the defendant, the deceased, J. H. Hurlin, one R. L. Patterson, the witness Charles Sheffler, and a woman, were in a certain scow about six feet wide and thirty-two feet in length; that the deceased, Hurlin, Patterson, and Sheffler were seated in the stern of said scow about four feet forward of the extreme stern, and facing toward the stern, side by side; that the woman was sitting facing Hurlin; that the defendant, without any warning or provocation whatever, standing immediately behind said deceased and about four feet from him, shot him through the head with a shotgun, killing him instantly; that he immediately, with the other barrel, shot and wounded R. L. Patterson in the left shoulder.

10 That in truth and in fact the killing of the deceased occurred in the following manner, to wit:

That the deceased, Hurlin, and R. L. Patterson, at the time the fatal difficulty began, were sitting in said scow on the bed of R. L. Patterson, on the port or left-hand side thereof, facing the defendant, who was sitting on the right-hand side of said scow on his bed; that they were casting up their accounts to see how much each had paid out for the outfit then in their possession, preparatory to a division thereof; that a quarrel sprang up over some differences, and Patterson struck the defendant, who struck him back; that at that instant the woman called out to the defendant to look out, they were getting their guns; that defendant thereupon sprang to the stern of the scow and seized his shotgun; as he did so he saw Hurlin in the act of rising up with his Winchester rifle in his hands, which he had taken from beneath his blankets at a point near the bow of the scow, on the left-hand side thereof; that said scow was covered with a tarpaulin; that defendant thereupon shot the deceased with his shotgun, which was charged with goose shot, the charge taking effect in the side of his head, killing him instantly; that some of said shot took effect in the tarpaulin immediately beside the said Hurlin's head; that the said Patterson, at the instant the defendant fired at the said Hurlin, was making for and attempting to get a Winchester rifle

in the extreme bow of said scow, and was a half-stooping position near the front end of the said tarpaulin covering; that defendant thereupon fired at and wounded the said Patterson in the left shoulder, some of said shot taking effect in the tarpaulin immediately over him.

That the testimony of the witnesses M. C. Jensen, John Doe Wallace, and John Thompson, is material and necessary to the defence herein, in this: They will testify, if present, that they were at the scene of the homicide on the 28th or 29th day of September, 1899, and were in said scow helping to take therefrom certain provisions stored therein; that they saw and recognized shot marks on the tarpaulin covering aforesaid, on the left-hand side thereof near the bow, and also saw and recognized shot marks on the tarpaulin at the extreme front end thereof, and
11 at or near the middle or center of such front end; that they also saw blood on the scow immediately under the place where the first shot aforesaid took effect; that there was no indications of any shot marks whatever on or about or anywhere near the stern of said scow.

The witness M. C. Jensen will further testify that the witnesses for the Government stated to him at that time and at other subsequent times that the homicide occurred in the manner above set forth.

The witness John Chapman will testify that in the month of March, 1899, he saw and talked with the witnesses for the Government herein, and that they then and there detailed to him the circumstances of the homicide as substantially set forth herein.

The witness John Doe Hendricks will testify that he was at the said scow several times during the winter of 1898 and 1899 and saw shot marks on the tarpaulin at the same place as stated above.

That the defendant has used due diligence to procure the testimony of said witnesses; that after this cause was continued by the Government at the May term, 1901, of this court, on to wit, August 10th, 1901, he procured a subpœna to be issued for said witnesses directed to the marshal of the district of Alaska, division No. 2; that said subpœna was served upon the said M. C. Jensen on the 20th day of September, 1901; that the said M. C. Jensen has failed to appear herein in obedience thereto, and the defendant has procured an attachment to be issued to compel such attendance; that said attachment has not yet been returned.

That on the 21st day of August, 1901, defendant also procured a subpœna to be issued for said witnesses, which last subpœna was sent to the marshal of division No. 2 at St. Michaels, Alaska, by due course of mail, in an envelope containing the card of his attorneys, Malony & Cobb, on the upper left-hand corner thereof; that said subpœna has not been returned either to this court or to his said attorneys, and defendant does not know why the same has not been returned.

Defendant further shows that the season of navigation for the Lower Yukon and St. Michaels closed about October 15th on account of ice; that there is now no probability of said attachment and subpœna
12 being served and the attendance of said witnesses secured during the present term of this court; that defendant knows of no other source or any other witnesses from which said testimony can be procured.

That the witnesses, John Thompson and M. C. Jensen reside at Camp Dewey, on the Yukon River, said division No. 2; the witness John Chapman resides at and is the Protestant Episcopal missionary at Anvik,

on the Yukon River; the witness John Doe Hendricks resides at Blackburn, a trading post on the Yukon River about sixty miles above Anvik; that the defendant expects to be able to secure the attendance of said witnesses at the earliest time at which said process can be served and said witnesses have time to reach Southeastern Alaska under natural climatic conditions; that this application is not made for delay, but that justice may be done.

Whereupon deponent prays that this cause be continued over the present term of this court.

A. H. BIRD.

Subscribed and sworn to before me this 11 day of December, A. D. 1901.

[SEAL.] W. J. HILLS, *Clerk.*

(Endorsed:) Original. No. 1327. In the United States district court for Alaska, division No. 1, at Juneau. United States of America, plaintiff, vs. Homer Bird, defendant. Filed Dec. 17, 1901, W. J. Hills, clerk.

UNITED STATES } No. 1327. Order.
vs.
HOMER BIRD. }

And now, on this day, this cause having come on regularly for trial, plaintiff being represented by Robert A. Friedrich, esq., U. S. attorney, and defendant being present in court and in the custody of the U. S. marshal, and represented by Messrs. Malony & Cobb, his attorneys, and being asked by the court if all of the parties are ready for trial, the prosecution announcing on the part of the United States that it is ready for trial; whereupon the defendant, by his attorneys, presented
13 his application for a continuance in this cause over the term, based upon the affidavit of the defendant at this time filed; and after argument had the court takes the same under advisement until 2 o'clock p. m.

Court having reconvened at 2 o'clock p. m., the U. S. attorney on behalf of the Government presented his certain letter from the U. S. marshal of division No. 2 relating to the serving of process upon witnesses for the defense herein, and affidavit of C. L. Vawter, ex deputy U. S. marshal, touching the same matters, the consideration of which is objected to by counsel for the defense, which objection is by the court overruled, and to which order and ruling of the court defendant by counsel excepts. Whereupon the court having had under consideration the motion of defendant aforesaid for continuation in this cause and therewith so much of the affidavit of Vawter as refers to the residence of the said witnesses for the defense and not served by the U. S. marshal, and to absence from the district, the letter of the marshal of the 2d division, his return on the subpœnas for said witnesses, and the former record and proceedings of the court in this case, denied the said motion; to which ruling and judgment of the court in so denying said motion aforesaid defendant by his counsel now and here excepts. Whereupon the court inquired of the parties if they were ready for trial, the U. S. attorney answering on behalf of the Government that the plaintiff was

ready, the defendant's attorneys saying that they had another motion to present to the court after a juror should be called for the trial of the case. Whereupon the court ordered the case to proceed, and a juror, one Charles A. Fox, was called into the jury box; thereupon the defendant by his attorneys objected to further proceeding of the trial of said case on the ground that the defendant had not been served with the names of the witnesses for the prosecution and their place of residence two days before the beginning of the trial, and further that they had not been served with the names of the regular panel of the jury two days prior to the trial of the cause as required by statute of the United States, section 1033, and further that the jury had not been drawn in accordance with law. Whereupon it was ordered by the court that the trial
14 of this cause be postponed until Friday morning next at 10 o'clock a. m.; in the meantime the defendant be served with the names and residences of the witnesses, and the regular panel of jurors for the present term of court. Dated December 17th, 1901.

UNITED STATES } No. 1327. Service of list of jurors for December,
vs. 1901, term, and list of witnesses in this cause set
HOMER BIRD. } for trial Friday, Dec. 20, 1901.

And now on the same day the defendant was again brought into court, appearing in the custody of the U. S. marshal and by counsel, and thereupon in open court the United States attorney delivered to the said defendant a list of jurors composing the regular panel of the jury as the same now stands, with the residence of each set opposite their names, and also delivered a list of the witnesses for the prosecution, with their residences set opposite their several names. Dated December 17th, 1901.

UNITED STATES }
vs. } No. 1327.
HOMER BIRD. }

Now comes the defendant herein in his own proper person and moves the court to strike this cause from the docket and order the discharge of the defendant herein, for the following reasons, to wit:

1st. Because this court has no jurisdiction of the crime charged in the indictment herein.

2nd. Because this court has no jurisdiction of this cause.

MALONY & COBB,
Attorneys for defendant.

(Endorsed:) Original. No. 1327. In the United States district court for Alaska, division No. 1, at Juneau. United States, plaintiff, vs. Homer Bird, defendant. Motion. Filed Dec. 20, 1901. W. J. Hills, clerk.

FRIDAY, *December 20th, 1901.*

UNITED STATES }
15 *vs.* } No. 1327. Trial.
HOMER BIRD. }

And now on this day this cause came on for trial in accordance with the order and ruling of the court heretofore made, whereupon before further proceeding to trial defendant filed his motion for an order of this

court dismissing this cause for want of proper jurisdiction, which said motion is by the court denied; to which order, judgment, and ruling of the court in so denying said motion, defendant by counsel excepts. Whereupon defendant renews his objection heretofore made to the empaneling of the jury herein for the reason that the same was not properly drawn as provided by statute, which objection by the court having heretofore been overruled, is again overruled by the court, to which order defendant by counsel excepts. Thereupon Chas. A. Fox, Charles Williams, P. B. Hunting, Allan Shattuck, Hugh L. Tracey, J. C. Barlow, V. C. Spalding, P. Loftus, R. A. Chisholm, Alex. M. Ross, John Finley, S. H. Flowers, and A. H. Brackett were passed as for cause as jurors in this case. Whereupon the defendant excused peremptorily Alex. M. Ross and S. H. Flowers, and the panel of regular petit jurors for this term being exhausted, it is ordered by the court that the clerk of this court issue a special venire directed to the U. S. marshal for division No. 1 of the district of Alaska, directing him to summon from the body of this division of the district of Alaska, and not from bystanders, 40 good and lawful men qualified as jurors to complete the jury in this cause, and that they report into court at 10 o'clock a. m. to-morrow. Whereupon after the jury being duly cautioned by the court as provided by statute, the jury in this cause in the charge of two sworn bailiffs
16 retire to their jury room to be returned into court at 10 o'clock to-morrow.

SATURDAY, *December 21st, 1901.*

UNITED STATES
vs. } No. 1327. Trial.
HOMER BIRD.

And now on this day came the U. S. attorney, on the part of the plaintiff, came also the defendant in the custody of the U. S. marshal and being represented in court by Malony & Cobb his attorneys; came also the following-named jurors remaining in the box on yesterday: Chas. A. Fox, Charles Williams, P. B. Hunting, Allan Shattuck, Hugh L. Tracey, J. C. Barlow, V. C. Spalding, P. Loftus, R. A. Chisholm, John Finley, A. H. Brackett, each answering to his name, and the U. S. marshal having returned the venire heretofore issued under the order of this court for 40 good and lawful men summoned from the body of division No. 1, district of Alaska, and not from bystanders, the following persons were selected and sworn as jurors to try the issues in this cause: P. B. Hunting, Allan Shattuck, P. Loftus, John Finley, H. P. Hansen, M. J. O'Connor, W. M. Helman, John McWilliams, J. E. Connell, J. W. Hunter, J. M. Burrows, Charles F. Stowe, after which counsel for the United States made his opening statement to the jury as to the matters and things which he expected to prove; and thereafter counsel for the defendant made the opening statement of the defendant as to the matters and things which the defendant expected to prove in this cause.
17 Whereafter the jury, again being duly cautioned by the court, were committed to the charge of the two sworn bailiffs, to be returned into court on Monday morning, December 23d, at 10 o'clock a. m.

MONDAY, *December 23d, 1901.*

UNITED STATES } No. 1327. Trial.
vs.
HOMER BIRD. }

And now on this day came the United States attorney, came likewise the defendant in the custody of the U. S. marshal, and being represented by his attorneys Malony & Cobb, came also the jury heretofore empaneled and sworn and each answering to his name the following proceedings were had:

Charles Sheffler, Naomi Strong, and C. L. Vawter were sworn and testified on behalf of the prosecution and the United States rested its cause. Thereafter Homer Bird, J. H. Condit, and A. K. Delaney were sworn and testified on behalf of the defendant, and this cause is continued until 10 o'clock a. m. to-morrow.

TUESDAY, *December 24th, 1901.*

UNITED STATES } No. 1327. Trial.
vs.
HOMER BIRD. }

And now on this day came the U. S. attorney, came also the defendant in the custody of the U. S. marshal, came likewise the jury heretofore empaneled and sworn in the charge of the sworn bailiffs, and each answering to his name the following proceedings were had, to wit: Homer Bird was recalled and testified on behalf of the defendant; H. J. Gurr was sworn and testified in defendant's behalf; whereupon defendant rested his cause. Thereafter C. L. Vawter, Charles Sheffler, Naomi Strong, and F. D. Kelsey testified on behalf of the prosecution in rebuttal, and the prosecution again rested its cause. And after argument had by counsel for the United States and counsel for the defendant, and the jury being duly instructed as to the law in the premises, by the court, retire in charge of two
18 sworn bailiffs for deliberation and thereafter return into court in charge of their bailiffs and each answering to his name present their verdict, which is in words and figures as follows:

"THE UNITED STATES OF AMERICA,
District of Alaska:

In the district court of the United States for the district of Alaska. Div. No. 1.

THE UNITED STATES OF AMERICA } Verdict. December term, 1901.
vs.
HOMER BIRD. }

We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty of murder as charged in the indictment.

ALLAN SHATTUCK,
Foreman."

Whereupon counsel for the defendant requesting that the jury be polled, each juror was asked if the verdict so returned was his verdict, and each

answering that it is, the verdict was received by the court and ordered entered and filed. Whereupon the jury were excused from further consideration of this cause and the defendant was ordered committed to await sentence.

At the time the jury was instructed by the court the defendant by his counsel excepted to each and every of the instructions given, and excepted to the ruling of the court in refusing each and every of the instructions refused.

MONDAY, *January 6th, 1902.*

UNITED STATES
vs. No. 1327. Order.
HOMER BIRD.

Now, on this day this cause coming on to be heard on motion by defendant to set aside the verdict and to grant a new trial, together with a motion by defendant for an arrest of judgment herein; and the
19 court having heard argument by Messrs. Malony & Cobb, counsel for defendant, and by Robert A. Friedrich, United States attorney, for the United States, and the court being fully advised in the premises now at this time overrules said motion for a new trial, to which ruling the defendant then and there excepted, and said exception was allowed by the court; and at the same time the court being fully advised in the premises overrules said motion in arrest of judgment herein, to which ruling of the court the defendant then and there excepted and said exception was then and there allowed by the court. And the defendant is hereby granted 60 days within which to reduce his exceptions to writing and present them to the court for allowance. At and during the hearing of said motion, the defendant, Homer Bird, was present in person in the custody of the U. S. marshal; and upon motion for sentence of the defendant by the U. S. attorney, the court fixed Thursday, January 16th, 1902, as the day upon which he would pass sentence upon said defendant.

THURSDAY, *January 16th, 1902.*

UNITED STATES
vs. No. 1327. Judgment.
HOMER BIRD.

This day having been heretofore fixed by the court as the day upon which judgment and sentence would be rendered against the defendant Homer Bird upon the verdict of the jury heretofore returned whereby the said defendant was and is found guilty of the crime of murder as charged in the indictment herein, and without any qualification of said verdict, the defendant being present in person and by his counsel Malony & Cobb, and the United States being represented by Robert A. Friedrich, United States attorney for Division No. 1 of the District of Alaska, the court asked the defendant if he had anything to say why judgment and sentence should not now be pronounced against him, and answering nothing in that behalf, and the court being fully advised in the premises, it is now considered and adjudged, and it is the judgment of the court,
20 that you, Homer Bird, be taken by the United States marshal to Sitka, in the District of Alaska, and there confined and subsisted

in the common jail at that place until Friday, April 11th, A. D. 1902, on which said day between the hours of 10 o'clock in the forenoon and 2 o'clock in the afternoon, you be taken by the marshal or one of his deputies to a convenient place theretofore duly prepared in said town of Sitka, and there hanged by the neck until you are dead.

McBROWN, *Judge.*

MONDAY, *March 3d, 1902.*

21 UNITED STATES *vs.* HOMER BIRD. } No. 1327. Order.

And now on this 24th day of February, A. D. 1902, one of the regular days of the same term of court and within the time allowed by the court, the defendant presents this his bill of exceptions, and prays that the same be allowed, signed, sealed, and made a part of the record herein, which is accordingly done in open court this third day of March, A. D. 1902.

22 UNITED STATES *vs.* HOMER BIRD. } No. 1327. Bill of exceptions.

Be it remembered that on the trial of the above entitled and numbered cause the following proceedings were had, to wit:

First exception: When the cause was called for trial it appeared that the petit jury to serve for the present term of the court was selected in the following manner, to wit:

It appeared that on the 9th day of November, 1901, and during the Skagway term of court, Charles D. Rogers, a prominent member of the principal political party, opposed to that to which the honorable W. J. Hills, the clerk of the court, belonged, was by the court appointed a jury commissioner for the Juneau, December, 1901, term of court.

It further appeared that the following record that the three hundred names were placed in the jury box was made, to wit:

UNITED STATES OF AMERICA,
District of Alaska, Division No. 1, ss.

I, W. J. Hills, clerk of the United States district court for the first division of the district of Alaska, do hereby certify that on the 13th and 14th days of November, 1901, did, in connection with Charles D. Rogers, commissioner appointed to select jurors for the Juneau, December, 1901, term of this court, deposit in the jury box the names of three hundred men believed by us to be qualified jurors for the first division of the district of Alaska.

In witness whereof I have hereunto set my hand and affixed the seal of the court hereto this 13th day of November, 1901.

W. J. HILLS,
Clerk of U. S. District Court for District of Alaska, Division No. 1.

CHARLES D. ROGERS.
[SEAL OF COURT.]

23 And on November 23rd, 1901, thirty-six names, to serve as the petit jury for the present term of this court, were drawn from said box.

And thereupon the defendant objected to be placed upon his trial before a jury drawn from said panel, because it appears from the record that the three hundred names of jurors placed in the box from which said panel were drawn were not selected as required by law; but the court overruled said objection and compelled said defendant to go to trial and select the trial jury from said panel, to which ruling of the court defendant then and there excepted.

SECOND EXCEPTION.

And a juror was then called to answer upon his voir dire, and the defendant thereupon moved the court to strike the cause from the docket and order the discharge of the defendant, for the following reasons, to wit: 1st, because this court has no jurisdiction of the crime charged in the indictment; 2nd, because this court has no jurisdiction of this cause. Which said motion was by the court overruled and denied, to which ruling of the court the defendant then and there excepted.

And a jury having been selected, impaneled, and sworn, the Government, to maintain the issues on its part, introduced as a witness Charles Sheffler, who, having been duly sworn, testified as follows:

On direct examination by Mr. FRIEDRICHS:

What is your name?

A. Charles Sheffler.

Q. Mr. Sheffler, how old are you?

A. I'm twenty-five—going on twenty-six.

Q. Where is your home?

24 A. New Orleans.

Q. Was you born in New Orleans?

A. No, sir; I was born in Mississippi.

Q. How long did you live in New Orleans?

A. I lived in New Orleans from the time I was ten years old.

Q. What is your occupation?

A. Printer.

Q. Was that your occupation in New Orleans?

A. Yes, sir.

Q. When did you begin to learn the printer's trade?

A. I began to learn the printer's trade some time after I left school. I can't exactly recall when I did go into the printer's trade.

Q. Did you continue to work at the printer's trade until you left New Orleans to come North?

A. Yes, sir; most of the time.

Q. For whom did you—or did you know Robert Patterson in New Orleans?

A. Yes, sir.

Q. Did you ever work for him?

A. I worked under him; yes, sir.

Q. In what capacity was he working?

A. Foreman of the printing office where I was.

Q. What printing office?
A. James Buckley & Co.
Q. How long had you known Robert Patterson—what kind of an office was that—printing office?
A. It was a stationery store and job printing office.
Q. How long had you known Robert Patterson?
A. I met him first—worked under him in New Orleans—I met him before in New Orleans, but got acquainted with him first when I worked under him in James Buckley & Co.'s.
25 Q. About what time was that?
A. That was in 1897 or late in 1896, somewhere.
Q. Now, Mr. Sheffler, when did you first meet the defendant, Homer Bird?
A. I met him in 1898, some time in March or April—somewheres around there.
Q. Now, I wish you would begin and tell the jury, in your own way, what led up to the acquaintance, when you first met him, and what happened between you and him and others in connection with this trip to the nort'ward, from the time of your leaving New Orleans on?
A. I met Mr. Bird through an advertisement in the paper which Mr. Patterson issued and had put in. That was during the gold fever—asking for parties in a prospecting party or outfitting party—I met him through that way——
Q. When was that notice put in the paper?
A. I don't exactly remember what month. I think in March some time.
Q. Of what year?
A. 1898.
Q. Was it signed by Patterson?
A. No, sir; just addressed to the paper offices.
Q. Where he was working?
A. No, sir; the paper that published the advertisement.
Q. What paper was that?
A. One the Times-Democrat and the other the Picayune.
Q. Just addressed some letters to the box of the paper?
A. Yes, sir.
Q. Now, go on and state how you came to—what lead up to the meeting with Bird.
A. Mr. Patterson and I used to get those advertisements from
26 the papers, the replies, the answers, and we had several of them in there, and amongst them was one from Bird, and Patterson asked me to go around and see who he was, and tell him I would like to meet him. Through that way I met Mr. Bird.
Q. Where was the first time, and under what circumstances?
A. The Lumberman's Exchange on Garonne street; he met Mr. Patterson, I think, right after that sometime; they talked the——
Q. Well, you're getting ahead a little. Did you meet Bird at the Lumberman's Exchange?
A. Yes, sir.
Q. Did you have any conversation with him?
A. I told him what the proposition was, what they intended to do; that they were trying to get up a party to go North.

Q. Did you make any appointment with him for that purpose?

A. Yes, sir; he asked me when he could see Patterson, and I told him some time in the evening when he got through work—after he got through his work in the evening.

Q. Did he fix an appointment?

A. He asked me what time; I told him about half past five he generally got through on the paper, and Patterson and I met him one evening on Garonne street—Patterson and I.

Q. How soon was that after you met him on the exchange?

A. A day—well, a day or so after; I don't know exactly.

Q. What took place when you and Patterson met him?

A. They spoke of different ways of going North, and one thing or another—never came to any understanding. They spoke of the trip, and what kind of a party they intended to form to go North with, and so on.

Q. Did Mr. Patterson outline his plans to Bird?

A. Yes, sir; and about that.

Q. Did they simply talk the matter over on the street at that time?

27 (Objected to as leading, by Mr. Cobb, attorney for the defendant. Objection sustained.)

Q. What did they talk about there, Mr. Sheffler?

A. On the street corner——

Q. Yes.

A. I don't remember exactly what was said. It was on the street; we met him on Garonne street; in fact, I don't remember if I stayed with them all the time, but I remember of them meeting on Garonne street there.

Q. When did they next meet, if you know?

A. They met several times after that. All the meetings I can't remember or describe them.

Q. Were you generally present?

A. Some of them; yes, sir.

Q. Well, state if any conclusions were arrived at or agreed on.

A. We met several times, once or twice out at Patterson's house, and they agreed to form a party of five, or more if they could get them; anyway five was about all they could get at the time, and it was agreed we would get a boat at San Francisco and go north up the Yukon River.

Q. Now it was agreed there should be a party of five, you say; who was that agreed between?

A. Between Bird, Hurlin, Patterson, and myself.

Q. When did Hurlin first come into the plan, if at all?

A. I met him one evening out at Patterson's house. I went out there one evening and met him, and he told me he was one of the party that was going along.

Q. Was that the first time you had seen Hurlin?

A. Yes, sir.

28 Q. Who was Hurlin; what did you know about him—what kind of a man was he?

A. Hurlin was a young fellow; he kept books for a wholesale boot and shoe store—I don't remember the name—on Canal street somewheres; he was working there when I met him at Patterson's house.

Q. What aged man was he?

A. Hurlin was about——

By Mr. MALONY, attorney for the defendant. Now, what you are testifying about his age and his occupation, is that from your personal knowledge, or what someone has told you?

A. From my own knowledge.

By Mr. FRIEDERICHS. What aged man was Mr. Hurlin?

A. I should judge about twenty-five or twenty-seven, somewheres there; he was a young man.

Q. How was he as to physique?

(Objected to by Mr. Malony, on behalf of the defendant, as incompetent, irrelevant, and immaterial.

Objection overruled. Exception.)

Q. What was his size?

A. O, he was a small man—not a very large man.

Q. What was his weight?

A. He would weigh about a hundred and forty, somewhere around there; wasn't a very large man, and was light complected.

Q. Can you give the month in which you met Hurlin the first time?

A. No, sir; it was probably in March, or somewhere about there; I don't exactly remember the month.

Q. When you met him, you say Patterson introduced him as
29 one of the party—the party that was to go North?

A. Yes, sir; out at Patterson's house.

Q. Now, who comprised the other two? You have named Patterson, Bird, and Hurlin; who was to be the other two?

A. Patterson, Hurlin, Mr. Bird, and a man by the name of LaCarr, and myself.

By Mr. MALONY. What was that name now, LaCarr?

A. Yes, sir.

Q. How do you pronounce it—spell it?

A. I don't know how to spell it.

By Mr. FRIEDERICHS. Were you ever present when all the details of the arrangement were talked over?

A. Yes; I was present when they met at Patterson's house; Hurlin, Bird, and myself.

Q. State what that arrangement was, what each man was to do, and so on.

A. There was to be a party with supplies, to go up the Yukon River with the boat, to have eighteen months' provisions, and each man was to put up five hundred dollars, or his share, whatever it would be, and they all agreed to that; and then we lingered along and didn't make any regular agreement there; they talked it over and one thing or another, and it was considerable time after that—in fact we met several times off and on. It finally come toward the latter part, and I found out I couldn't get—there was a man that was going to stake me to go, and he finally backed down and said he didn't want to stake me on the trip, so I told them one evening. And they had some talk over that, and so Patterson finally wanted me to go in his place, and I told him——

(Here the court interrupted to excuse the regular panel of the jury during the trial.)

30 Q. Who was present when you stated that the person who agreed to put up your share of the money had declined?

A. I met Mr. Hurlin and Bird on the street, and we were going to see Patterson, and did go and see him, and then I told him. He wanted me to go in his place, and I told him I didn't very much care to go in his place, and they talked around and finally agreed——

By Mr. MALONY, for the defendant. Were you present when they did all this talking around?

A. Yes, sir; part of the time, not all. So they said I could go along anyway; they would put up between them, and let me go along and work my way.

Q. Who agreed to that?

A. Bird agreed to that. He was the person that suggested that I could go along anyway.

Q. Well, what then? What was the final result, the final agreement between you?

A. So we met two or three days after that, and they didn't come to any final agreement at all you might say; but we met one evening or afternoon and they wanted to know if they were going or not, and finally they made up their minds to go, and they sent me and Hurlin off first. We met in a saloon there, and Patterson gave me some money, and Bird bought us tickets to San Francisco.

Q. Two tickets?

A. One for me and one for Hurlin; yes, sir.

Q. First or second class tickets?

A. Second class.

Q. How much did he pay for those, if you know?

A. About forty dollars apiece, I think.

31 Q. Did Bird give you any money aside from the ticket?

A. No, sir.

Q. Patterson gave you some money, you say?

A. Yes, sir.

Q. How much?

A. About ninety dollars.

Q. When did you leave New Orleans to go north, or to San Francisco?

A. We left New Orleans about April—some time the beginning of April, I believe; somewheres there, I think.

Q. Was there any persons at the depot with these people when you left on the train?

A. Mr. Hurlin and I left, and we just caught the train in time, just as it was starting out, and Mr. Bird and Mr. Patterson was there with their wives, I think.

Q. Now, what arrangements did you have—whose wives did you say?

A. Mr. Bird's and Mr. Patterson's, I think. In fact, I didn't have time to notice closely—just had time to catch the train as she pulled out.

Q. Now, what were to be the arrangements when you got to San Francisco?

A. We were to go and make a selection of a boat, and get the price of provisions, and get some means of transportation and the cost, and we were to make a deposit on these things, and let them know the arrangements when they came out afterwards.

Q. Was there any time agreed on when they should follow you?
A. None in particular; no, sir.
Q. When did you get to San Francisco, as near as you can state?
A. Somewheres about the thirteenth or fourteenth, I don't remember the exact day; the early part or middle of April, 1898.

32 Q. Now, what did you do in San Francisco with reference to the furthering of the objects of this expedition?

A. We went and looked up for a boat—went to get a boat. We thought we would get a stern-wheeler to go up the river with, but we found we would have to get a smaller boat, and we went down to see George Neese, on Third street—I think that's the street—and we priced the provisions and transportation and made deposits on them—on all of those things—got the sailing dates of the vessel——
Q. What did you contract for? On what did you make these deposits?
A. We contracted for a boat or scow thirty-two feet by six feet beam, and a small launch about nineteen feet, six feet beam, and a boiler and engine for the launch, and made deposits for transportation——
Q. To St. Michaels?
A. Yes, sir; on the freight that was to go along.
Q. Do you know what the price of this launch and scow was?
A. The whole thing together—I don't know exactly what it did cost, but it never cost over five hundred dollars.
By Mr. MALONY, for the defendant. What was that? The launch?
A. Yes, sir.
Q. What did the scow cost?
A. I don't remember what that did cost.
By the COURT. Mr. Malony, you will be given an opportunity to cross-examine as soon as the Government finishes with this witness.
By Mr. FRIEDERICHS. Did you make any contract about provisions?

A. Yes, sir; we got a price-list of provisions, and I don't

33 remember whether we made a deposit on them or not.

Q. Whose money did you use in making these deposits?
A. Hurlin's and Patterson's.
Q. Did you use the same ninety dollars that Patterson gave you?
A. Yes, sir; for deposits.
Q. How much of a deposit did you make?
A. I deposited the whole amount on different occasions.
Q. On the things purchased for this expedition?
A. Yes, sir.
Q. Did you have any means at all of your own?
A. No; not at the time.
Q. How were you living?
A. Hurlin and I were living together there; he paid the expenses.
Q. You put this money on deposit and lived with him?
A. Yes, sir.
Q. How long after you arrived in San Francisco was it that any of the balance of the party came?
A. They came to San Francisco in May, some time about the middle part of May, the tenth, I think—I don't know exactly which—they arrived.
Q. Who arrived?

A. Mr. Patterson, Mr. Bird, and Mrs. Strong.

Q. When did you first see Bird in San Francisco? Where, and under what circumstances?

A. The first time I seen him was down at George Neese's, I think, where we bought the boiler, I think; and then we met him and Patterson and Mrs. Strong down at the board of trade. The board of trade had a store where they had supplies for those outfitting for the North, and they gave a pamphlet to everyone and showed you the wares they were selling at the time.

Q. Did you purchase supplies at the board of trade?

34 A. O, no; they would just tell you where they were—the merchants to buy from.

Q. That is the first time you met Mrs. Strong?

A. No, sir; I met her once in New Orleans.

Q. When and under what circumstances?

A. At my house, I met her once.

Q. Whose house?

A. At my home, my father's house.

Q. Under what conditions and circumstances?

(Objected to by counsel as immaterial.

Objection overruled. Exception.)

A. I met—Mr. Bird came out to my house one evening with Mrs. Strong, and wanted to see if I had learned anything about what was going on in regard to this party.

Q. He brought her with him?

A. Yes, sir.

Q. Did he introduce her?

A. Yes, sir; I think he did.

Q. To whom?

A. To me.

Q. As whom?

A. As his wife.

Q. Was there any arrangements about her going on this trip?

A. No, sir; none whatever.

Q. Was that the first and only time you had ever met her until you saw her at the Board of Trade in San Francisco?

A. Yes, sir.

Q. You say this was at your father's house?

A. Yes, sir.

Q. What business, if any, is your father in in New Orleans?

A. Tanner.

35 Q. Of what does your family consist?

A. Father, mother, and five brothers.

Q. Now, then, coming back to San Francisco, how long did the party remain in San Francisco—all of you?

A. Didn't remain very long; it must have been six or seven days.

Q. What did you do there after Bird arrived?

A. We finished paying up on all we made deposits on, brought the provisions and what clothing we had and everything, and put it on the sailing vessel—the Rufus E. Wood.

Q. Is that the vessel on which you engaged passage for St. Michaels?

A. Yes, sir.

Q. What amount of provisions were laid in in San Francisco?

A. We estimated it would last about eighteen months.

Q. Now you took passage on the Rufus E. Wood for St. Michaels, you say?

A. Yes, sir.

Q. When?

A. We left San Francisco about the 21st of May, 1898, or thereabouts.

Q. Of whom did the party consist at that time?

A. When we left San Francisco, it consisted of Hurlin, Patterson, Mrs. Strong, Bird, and myself.

Q. How was Bird and Mrs. Strong travelling?

A. As man and wife.

Q. Under what name if any?

A. Bardick, I believe.

Q. Did Bird say anything to you, or make any explanation, as to why they were travelling under an assumed name?

A. None whatever.

Q. How did they travel with reference to staterooms, or the locality on the ship?

36 A. Mr. Patterson, Mr. Bird, and Mrs. Strong were travelling in the cabin of the ship; all three had the same stateroom. Mr. Hurlin and I were travelling up in front as steerage.

Q. As second class?

A. Down in the hole. I guess that's second class.

Q. Now, how long were you in making the trip from San Francisco to St. Michaels?

A. It took about forty days.

Q. Do you remember when you arrived at St. Michaels?

A. At the beginning of July, the fourth of July, I think.

Q. How long did you remain in St. Michaels?

A. Some time; very near two weeks, I believe; we left there, anyway, somewhere around the 19th of July.

Q. What was the cause of your delay at St. Michaels, if you know?

A. Well, it took considerable time to get out our freight and box it, and Patterson had mashed his finger in helping to take some freight off the boat; that caused quite a delay.

Q. Well, you left there on the 19th of July?

A. Yes, sir.

Q. How did you leave, under what——

A. With the scow, loaded with provisions, and the small launch towing the scow.

Q. For the Yukon River?

A. Yes, sir.

Q. How long were you from the time you left St. Michaels until you arrived at the place where you went into camp for the winter?

A. Well, it was quite a time; we had considerable hard time in getting up the river, because we—when we left St. Michaels we went through the canal at St. Michaels—well, comes from the open sea into the

37 mouth of the Yukon; we went through that and crossed over toward the mouth of the Yokon River, and instead of going up the Yukon

we went up a smaller river or arm north of the mouth, I think. We went up there and stayed a week or so before we found out we were on the wrong river, and then we had to come back. Then we found the Yukon by the aid of a pilot, an Indian, and we went up the mouth of the Yukon then—found the Yukon proper.

Q. And then you began your ascent up that river?

A. Yes, sir.

Q. How far did you travel up the Yukon—as far as you know?

A. By water, I think, about six hundred miles.

Q. And about what time did you go into camp?

A. We went into camp, I think, the beginning of September.

Q. Where was that, as near as you can describe it?

A. On the Yukon River, between Koltag and Malado—Koltag is this side of Malado and Anvik—there's one or two small stations between, I believe.

Q. About how far above Anvik is that?

A. About eighty-five miles, I think.

Q. Where was it with reference to a place called Camp Dewey and Slaughterhouse Gulch?

A. The place where we was was called Slaughterhouse Gulch—it was below Camp Dewey.

Q. How far below?

A. About two or three miles; about that.

Q. That was in Alaska?

A. Yes, sir.

Q. Was this place called Slaughterhouse Gulch at the time?

A. No, sir; I never heard that it was called Slaughterhouse Gulch until after I got out of it.

Q. And that, you think, was sometime in the early part of September of 1898?

38 A. That we stopped there; yes, sir.

Q. Which side of the Yukon did you tie up on?

A. The north side, I think.

Q. The left-hand side of the river going up?

A. Yes, sir.

Q. What was your object in stopping there?

A. Well, it was getting late in the season, and getting very cold and very hard to travel and very disagreeable travelling; we was afraid it would freeze up and the boys wanted to stop; the current was pretty swift, and we were making such slow time.

Q. Who, if any one, was in control of the party more than another and gave directions?

A. Nobody had charge in fact, except Bird done a good deal of bossing.

Q. Was this determination to stop and camp arrived at after consultation among all of you?

A. Yes, sir; they finally agreed to stop there. We stopped up above a few days before we agreed to make winter quarters, and we were trying to locate a place, and finally located this place below this coal mine.

Q. Now, after you got there, what did you do?

A. We cleared off a place to build a cabin; it was a little ways back from the river; not very far.

By Mr. MALONEY, for the defendant. Now, if the court please, the witness refers continually to "they;" it will save a good deal of trouble if he will explain who he means.

A. All of us.

By Mr. FRIEDERICHS. Now, how far from the river bank did you select a site for a cabin?

39 A. Well, it was quite a distance from the bank up on the grade; there was a sort of a small hill, not exactly a hill, but a high grade, and it was right on top of it. It wasn't very high, but it was quite a distance from the river.

Q. How far from where the boats were tied at anchor?

A. The boats weren't anchored just at the time, until we had selected the site; the boats were brought there afterwards; it must have been quite a distance, though.

Q. Can't you approximate it?

A. It was over a couple of blocks; about two blocks and a half.

By Mr. MALONY, for the defendant. What was that distance now again?

By the COURT. Defendant's counsel will have ample opportunity to cross-examine when the Government is through. I have called attention to this before, Mr. Malony.

By Mr. FRIEDERICHS. About how far was it from the water in a direct line to the cabin?

A. About a block and a half.

Q. About the same distance?

A. Yes, sir; it wasn't more distance.

Q. Now, then, how soon after you selected this place did you begin work on the cabin?

A. Not very long afterwards; we cleared the site first, of course.

Q. What did you have to do to clear it?

A. Well, we cut one or two, or a number of trees down, and dug the ground down to get it level.

Q. What sized cabin did you determine to build there?

A. A very large cabin.

Q. Can you give approximately the size?

A. I don't remember the size; a very large cabin, though.

40 Q. Can you approximate the number of feet square it was?

A. It must have been twenty by thirty, or something like that.

Q. What was it built of?

A. Logs.

Q. Who got the logs out?

A. All of us—all of the men.

Q. How long were you in hewing the logs and getting them out?

A. It took us considerable time; about a couple of weeks to build it, I guess.

Q. Now, during the time you were building this cabin, was there any trouble or quarreling?

A. Well, they would get into a little squabble once in a while——

By the COURT. Who would?

A. Well, Bird and Hurlin and Patterson.

By General FRIEDERICHS. Give Bird's conduct at such times. What would he do?

A. Well Bird would want the logs put this way and that, and then they would get into a wrangle over it and get very angry, and he would get very disagreeable over it.

By the COURT. Well, that doesn't matter. You don't need to answer about that.

By General FRIEDERICHS. Well, who gave the directions in the building of that cabin?

A. Bird gave most of the directions.

Q. Now, you worked on the cabin until it was completed?

A. Yes, sir.

Q. If there was any disagreement during that time, state what it was.

A. It was very disagreeable quite a time before that, but we finally finished the cabin to live in. It became very disagreeable at
41 times, and we began to feel we couldn't live there together, but nobody had made up their minds about anything that far.

By Mr. MALONY, for defendant. Now, I would like to have the court instruct this witness to state who he means by "we."

By Gen. FRIEDERICHS. Who do you mean by "we," Mr. Sheffler?

A. Patterson, Hurlin, and Bird and myself. Things got so disagreeable——

Q. Well, things got so disagreeable in what way?

A. Well, Bird would get very contrary, and didn't like anything that was done; was disagreeable and cross in one way or another about things.

Q. Was the cabin completed yet when you three made up your minds you couldn't stand it?

A. One night Mr. Hurlin, Mr. Patterson, and I came up from the boat to go to work moss——

Q. You were living on the boat at that time, were you?

A. Yes, sir; and Hurlin had gone up after a load, and in a little while he came back and was crying. He said Bird had abused him, and it was getting so he couldn't stand it any longer——

(Counsel for defendant objects to the conversation with Hurlin as immaterial.

Objection sustained.)

Q. What did you all do pursuant to that?

A. In a little while Bird came up afterwards, and Hurlin told him things were getting so disagreeable he thought it would be better if we parted and lived in another cabin, and lived away from there. He said he didn't care; it was immaterial to him.

Q. Was that all that was said by Bird or the others?

42 A. That was about all that was said at the time; there might have been some other remarks made.

Q. When was that with reference to the 27th of September?

A. That was a few days before. The next day, or so, he asked us if we would help finish the cabin, so they could live in it, and we told him we would.

Q. Was that before or after this other conversation about leaving?

A. That was when we told him we thought we had better separate.

Q. You agreed to do that?

A. Yes, sir.

Q. Did you do it?

A. Yes, sir; we did it. We started in to finish the cabin and we finished it, and Mr. Patterson took sick a day or two before we got it finished, and Hurlin and I and Bird put the roof on and finished the cabin.

Q. How did you finish it with reference to keeping it warm?

A. The roof was covered with small trees, the boughs of small trees, and then moss put over, and mud over that again.

Q. You agreed you would finish the cabin for him, and you did so?

A. Yes, sir.

Q. How many days did it require you to finish the cabin?

A. Three or four days; I don't remember exactly how many.

Q. Then after the cabin was finished, what took place?

A. One night—this was right after the cabin was finished—Mr. Hurlin told him we were ready to leave——

Q. Told who; Bird?

A. Yes, sir; and he says, "You won't leave until I get good and damned ready."

Q. Go on and state everything that happened and was said there.

A. Nothing was said more than that that same night that I
43 remember of. They spoke of different things, but I wasn't present when they spoke of different things, or didn't hear all of it, and the next morning——

Q. Had anything up to that time been said about dividing the provisions?

A. They were talking about dividing then; yes, sir——

Q. On that evening?

A. Yes, sir; I think so. So the next morning, when we were ready to go, why we were preparing to get ready to leave, and they sent me up—Mr. Bird went up to the cabin; he was working around up there—and they wanted me to call him down and tell him that we would like to leave—we were ready to go—which I did, and he said he would be down shortly.

Q. That was the morning of what day?

A. The 27th, I think.

Q. What time in the morning was it?

A. I couldn't tell you the time.

Q. Early in the morning was it?

A. Yes, sir; it was getting dark up there those days. So he came down afterwards and went into the boat, and he hadn't been in the boat very long when we were called to breakfast.

Q. By whom?

A. Mrs. Strong.

Q. Bird came down and went into the boat?

A. Yes, sir.

Q. Where were you three on the boat?

A. I think Patterson was already on the boat, and Hurlin and I were on the bank laying some brush down to put the goods on from the boat——

Q. How far was that from the boat?

A. It was right alongside of the boat.

44 Q. Were you called to breakfast before Bird came, or afterward?

A. A little while afterwards.

Q. A little while after Bird went on board, you were called to breakfast?

A. It might have been a few minutes—wasn't very long.

Q. When you were called to breakfast, what did you do?

A. We went in to breakfast; Hurlin went in, and then I went in.

Q. Did Patterson join you?

A. Yes, sir; he was in the boat at the time.

Q. Whereabouts did you take your meals on the boat?

A. We always took them in the stern—had a stove in the stern, and did the cooking back there.

Q. Look at this map, and see if that is a fair drawing of this launch you speak of [handing witness drawing].

A. That's about the plan of the boat; yes, sir. I would say it's a correct plan.

By the COURT. What boat was that—the launch, or the scow?

A. The scow.

By Gen. FRIEDERICHS. That's a plan of the scow, is it?

A. Yes, sir.

Q. That's pointed up the river the way it lays?

A. Yes, sir.

Q. With this side next the bank?

A. This side next the bank; yes, sir. Well, the bank lays something like this [illustrating], through the boat, and the boat lays sideways up the stream.

Q. How deep is that boat?

A. About three foot deep, about seven feet across the beam here, and about thirty-two feet long. I never measured it, but that is what it was supposed to be.

45 Q. How was the space utilized?

A. This in there, from here to about here, was where the provisions were put. This here, from here to there, that was where the provisions were stored——

By Mr. MALONY, for defendant. Let the witness designate it so the reporter can get it in his notes——

A. All right. Put it from one to two on here, is where the provisions were stored; and in here was the bottom of the boat. I'll make that No. 3; and here, number four, is the stern seat of the boat, where the stove was set on.

Q. Where were the bunks?

A. The bunks were up. My bunk was near No. 1, and Hurlin's was right next to mine, and here on the left of the bunks, looking north, was Mr. Patterson's bunk, and on the right-hand side was Mr. Bird's and Mrs. Strong's bunk. Right back of their bunk, at the head of the bunk, was the grub box, and right down in by No. 3 was the water barrel there.

Q. Where did you all sit when partaking of your meals?

A. Right in here somewheres——

By the COURT. Where is "in here?"

A. Right at No. 3 there.

By Gen. FRIEDERICHS. Now, designate on No. 3 where you sat for your meals, and then describe the place you say is "about here."

A. We usually sat in there or thereabouts—No. 3—but on this occasion we sat on the seat right here, No. 2.

Q. Now, describe to the jury—that's all with the map—describe to jury what kind of a place this was where you sat to take your meals.

A. How do you mean, in the boat——

Q. Yes; where you were seated that morning—describe the arrangement.

46 A. It was in the stern of the boat. Generally there was nothing on the bottom of the boat. The scow generally came up that way at the back end so the keel could be put under, and we generally used to cook right in there.

Q. Describe how you were seated that morning.

A. Mr. Patterson was already in the boat, I think; Mr. Hurlin went in to breakfast first, and I went in afterwards, and when I was going in Bird was sitting in his bunk with a small valise, looking at some papers, and I went in and sat alongside of Hurlin, and Patterson sat alongside of me. Hurlin sat on the left of me, and Patterson on the right of me.

Q. What were you sitting on?

A. On that seat—I have forgot the number on the map—number two, isn't it?

Q. How were you sitting, close together, or was there any space between you?

A. There wasn't any space between us; that was about all that could get in there.

Q. Sitting close together?

A. Yes, sir; very close.

Q. Where was Mrs. Strong sitting?

A. Right across from the grub box there.

Q. Facing you?

A. Yes, sir.

Q. How was she with reference to where Bird sat?

A. She was facing Bird also.

Q. Did she serve you with breakfast?

A. Yes, sir; she served us with a plate of oatmeal and some coffee, and she asked Bird if he wouldn't have some breakfast, and he said he didn't care for any; he would have a cup of coffee or something later.

By the COURT: Which way were you facing as to the stern?

47 A. I was facing the stern of the boat.

Q. And Mr. Bird?

A. Bird was facing the stern also.

Q. How was Bird sitting with reference to where you sat?

A. He was right back of me.

Q. And about what distance from where you saw him sitting when you saw him with the valise?

A. He was sitting right about the middle of his bunk—very near the middle, probably three or four feet.

Q. About what distance would you estimate it from where he sat to where you and Hurlin were sitting?

A. About three or four feet at the time when I saw him when I first came in.

Q. From where you sat down to breakfast?

A. Yes, sir.

Q. You say Mrs. Strong had served you with a plate of oatmeal?

A. Yes, sir; and with a cup of coffee, I think.

Q. You were eating from a table, or from your laps?

A. From our laps; didn't have any room for a table.

Q. Did you have any conversation prior to this time after coming aboard the ship?

A. Yes, sir.

Q. With whom?

A. Well, we were talking——

Q. Between Bird and the balance of the party?

A. No, sir; not with Bird; at the time I was speaking with——

48 Q. With whom was that conversation had?

A. Mrs. Strong.

Q. On what subject?

(Objected to by counsel for the defendant on the ground that the same is immaterial.

Objection overruled. Exception.)

Q. Was Bird present where he could hear the conversation?

A. Yes, sir; we were talking about trapping some grouse at the time.

By Gen. FRIEDERICHS. Who were you talking with?

A. Mrs. Strong.

Q. Now, what next happened?

A. Why, we were eating and I was talking with Mrs. Strong, and all at once I noticed a frightful expression on her face and I turned to look——

Q. In what direction was she looking?

A. Right over toward the grub box where Bird was sitting; and just as I turned to look there was a shot fired, and as I looked I seen Hurlin's head drop; and I stooped and told Patterson to get up, and there was another shot fired; there was hollering and excitement, of course, and I turned around, and Mr. Patterson—before I turned around I believe Patterson jumped overboard; went toward the rear of the boat, and when I turned around Bird was backing off with the gun in his hand.

Q. What was he doing?

A. He had one or two shells in his teeth, and he poked his gun up to me and told me to stand there, and commenced cursing Bob, and called him a God damned son-of-a-bitch, "you're the cause of it all," or something like that.

49 Q. Was there any other shots fired than those two?

A. Yes, sir; he backed out of the boat, and as he backed out he took up my rifle, and after Patterson jumped overboard he came on the right-hand side of the boat and he began to beg of Bird, and by that time Bird had stepped out of the boat and Mrs. Strong came out about then and she hollered for him not to shoot any more; and he says, "No, Naomi, I won't shoot you;" and as Patterson got on the side of the boat he began to beg, "O, please don't shoot me, for my family's sake," and all that sort of thing, and Bird up and shot at him again.

Q. Where was Patterson at the time he shot at him the second time?

A. He was in the water.

Q. How long was this after the first two shots had been fired?

A. Not very long afterwards; must have been two or three minutes.

Q. Do you know whether Patterson was hit the first time Bird fired at him?

A. Yes, sir.

Q. Where?

A. He was hit on the shoulder; I could see the blood on the back of his shirt and shoulder.

Q. Now try and remember all that was said by Bird, Mrs. Strong, yourself, or any other person there, right at the time or immediately after the shooting occurred.

A. Why, when Bird—when Patterson hollered not to shoot he still kept begging Bird not to shoot, and Bird shot at him. O, he begged awfully, and finally Bird told him to come out, he wouldn't shoot at him any more.

By Mr. MALONY. Now, if the court please, I want this witness to repeat exactly what was said there.

50 A. I can't remember exactly what was said.

Q. Well, that's all right, sir; you could remember it all right enough the last trial—let's have it now.

By General FREIDERICHS. Give the exact words, if you can?

A. Well, he says, "For God's sake, don't shoot me; remember my family's sake." I don't remember all of it.

Q. What did Bird say?

A. He cursed him, and didn't say anything else until he came out.

Q. Can you remember the words he used to him?

A. He said, "You son-of-a-bitch, you are the cause of all this," or something to that effect.

Q. Where was Bird and Patterson when these remarks were being made?

A. Patterson was in the water.

Q. Where was Bird?

A. He was out on the bank.

Q. Go on, and state just what——

A. He called him out, told him to come out; he wouldn't hurt him. When Patterson got out, he—Bird told me to come out and help my friend. When I came out, Bird says to me "Don't you stand near me," and Patterson asked me to take him to the cabin; he wanted to go up there.

Q. Where was Patterson by this time?

A. Laying on the bank there.

Q. Did any conversation occur between him and Bird when he was on the bank?

A. Why, he was exhausted when he reached the bank—fell down and laid there, and Bird went up to him and says, "I'm sorry I did

51 this," or something like that, and they shook hands. Mrs. Strong was crying, and he told her to shut up and not holler so much, or something like that.

Q. Did Bird make any other remarks, why he was sorry?

A. No, sir; I don't think he made any other remarks.

Q. To refresh your memory, I'll ask you if he made a statement to the

effect if he had known a certain thing he wouldn't have shot him—that he belonged to any——

A. Not at that time; no sir.

Q. Now, after these shots were fired, you say you saw Bird backing off with the shells in his mouth?

A. Yes, sir.

Q. And backed off the boat; where did he get out of the boat?

A. Right out of the bow—looking right from the bow into the boat.

Q. And he got onto the ground——

A. Yes, sir——

Q. On the left; immediately after these shots were fired, what did Mrs. Strong do, as near as you can recall?

A. After the first two shots were fired, she got by and got out by me some way.

Q. Did you say anything to Bird at the time?

A. Yes; I begged him not to shoot me.

Q. What did he say?

A. He said, "God damn you, you stand there."

Q. You stood there?

A. Yes, sir; I stood there.

Q. Were there any other guns—you spoke of him going by and getting your rifle as he went out of the boat?

A. Yes, sir.

Q. What other guns were there in the party?

A. Hurlin had a gun.

Q. Where was his gun kept?

52 A. I don't know; he usually laid it all around, most anywhere.

Q. Did Patterson have a gun?

A. No, sir.

Q. How many guns were there in the party?

A. Three.

Q. What kind of guns?

A. Two rifles and a shotgun.

Q. Who owned the shotgun?

A. Bird did.

Q. Was it the one he had in his hands at the time he did the shooting?

A. Yes, sir.

Q. At the time these shots were fired, do you know where these other two guns were?

A. Mine was in the front, or bow, of the boat; I never knew where the other one was.

Q. Did you see any other gun during the time of the shooting?

A. No, sir.

Q. You say he commanded you to come over and help your friend?

A. Yes, sir.

Q. What did you do?

A. I went over and helped him. Patterson begged me to take him to the cabin; he was all wet, and we lifted him up, and when Mrs. Strong saw the hole in his shoulder she commenced to cry again, and she couldn't help him. Then Bird helped me up to the cabin with him, quite a piece up the incline; he was on one side and I was on the other.

Q. Were there any guns in the party then?
A. I think Bird had one gun in his hand; I'm not sure of that.
Q. Do you know whether Mrs. Strong was carrying any of the guns?
A. Not at the time; I remember a trip afterwards she was.
53 Q. Did Bird go with you to the cabin?
A. Yes, sir.
Q. What did you do with Patterson at the time?
A. We took him in there and laid him down in a blanket, and they had one valise with some medicines in it, and while he was gone——
By the COURT. Who was gone?
A. Bird; he went down and got them, and by that time Mrs. Strong came up with him, and she was carrying the guns; he handed me the valise.
Q. What, if anything, was said when he came back up there with Mrs. Strong?
A. There was nothing particular said there.
Q. How long did Bird and Mrs. Strong remain up there?
A. A very short time—just long enough to hand me the valise and go back down.
Q. Did they go back together?
A. Yes, sir.
Q. Just in a minute or so?
A. Just stayed there to give me the valise; yes, sir.
Q. Now, you say when the first shot was fired Hurlin fell with his head forward?
A. His head fell over; he was in a sitting position, and he had his plate of mush in his lap, and his head fell over that way.
Q. Did he move after that?
A. No, sir; he didn't move—and I saw blood in his plate and heard the blood gurgling——
Q. Did you see any wound on his person?
A. No, sir; just saw the blood in his plate and on his hands.
Q. Did he utter a word after he was shot?
A. No, sir; not a word.
54 Q. How long from the time the shot was fired and he fell into his plate that way was it until you was off the boat?
A. How do you mean?
Q. What interval of time intervened between the time of him shooting Hurlin and the time that you got off the boat?
A. It must have been two or three minutes—you mean between the shots how long did it take me?
Q. Yes.
A. It wasn't very long.
Q. Did you give any further attention to Hurlin after he was lying over this way?
A. No, sir; I was watching Bird.
Q. You was looking out for yourself?
A. Yes, sir.
Q. Did you see the body of Hurlin afterwards?
A. No, sir.
Q. Did you hear Bird say anything with reference to Hurlin, or the body of Hurlin, as to what had been done with it?

A. No, sir; not until he was arrested.

Q. Well, what, if anything, did he say with reference to the body of Hurlin?

A. After he was arrested?

Q. Yes, sir.

A. He was arrested down fifteen miles below, and when he was arrested they asked him what he had done with the little man and he said, "I will show you where I buried him."

Q. Who were they talking about?

A. Hurlin.

Q. Who did he say that to?

A. He said that to Black, I believe.

Q. Do you know whether he ever went back with them up there?

55 A. Mr. Blaine, Bird, and John Tompkins and I went back up there.

Q. Was that all you ever heard him say with reference to the disposition of Hurlin's body?

A. That was all; yes, sir.

Q. Now, this occurred on what day?

A. The date?

Q. Yes, sir.

A. On the 27th of September, 1898.

Q. Where?

A. That was on the Yukon River.

Q. At the place you have described as the place where you went into camp with your party for the winter?

A. Yes, sir.

Q. And in the district of Alaska?

A. Yes, sir.

Q. Now, after the murder of Hurlin, and the shooting or murder of Hurlin, what happened? Just give your life there, the way you lived and passed the time.

(Objected to by counsel for defendant on the ground that there is no testimony to show that Patterson was killed. General Friederichs is simply making that statement for effect on the jury—just like he did before.)

By the COURT. The inquiry is aimed to reach what occurred after the occurrences at the time of the shooting, and that the witness's attention is called to the time is all that is required.

By Mr. MALONY. Now we ask that the remark of the district attorney be taken down there as he made it, to which we except.

56 By Gen. FRIEDERICHS. Well, I will withdraw the question to save time and put it in the form "that Hurlin was murdered, and the other man was shot"—we know that he died afterward from it—but we will let it go that way——

By Mr. MALONY. We except to the remarks of the district attorney that he "died afterwards;" we'll show that he died long afterwards, with the scurvy or something of the kind.

By the COURT. Gentlemen, let there be no further contention between counsel; address your objections to the court and I will pass on them.

By Gen. FRIEDERICHS. Well, I'll ask you this in lieu of all that I put to you before: After the murder of Hurlin, and after the shooting of Patterson, what took place with reference to Bird, yourself, Mrs. Strong, and Patterson?

By the COURT. Is there objection?

By Mr. MALONY. No, sir; not to that question—we want that in. We can show a few things ourselves.

A. You mean the time—the whole winter we put in there?

Q. Yes, sir; what happened; how did you live, what was the nature of your life there—with reference to Bird always, of course?

A. After the 27th, the same night of the 27th, we all stayed in the cabin with Mr. Patterson, who was in the cabin at the time, and afterwards we packed up the provisions that was on the boat and brought them to the cabin and prepared to live in the cabin right along—you want me to tell you through the whole winter?

57 Q. Yes; what was the conduct of Bird and how you lived there, and how you got on, and all that occurred.

A. Why, we lived there from the time this killing happened until April some time. Had Patterson there also; he was wounded and we had to take care of him. Of course we had no chance of getting away from there, and cut wood and worked around that way. Things wasn't as agreeable as they ought to be, under those circumstances.

Q. Well, what was Bird's conduct toward you and toward Patterson?

A. He was very mean in a great many ways.

Q. State what happened, as near as you can.

A. Well, so many things happened during the time, so many little things, that I can't recall them now.

Q. What did you do besides cut wood?

A. Took care of Patterson.

Q. Anything else?

A. That's about all we did; yes.

Q. Did you ever hunt, or anything of that kind?

A. Yes; we went out hunting—would go over to the island and kill grouse.

Q. Did you still have your rifle up to the time you went out hunting?

A. I never got my rifle till a long time afterwards.

Q. Where was it?

A. I don't know.

Q. Where did you get it afterwards?

A. Bird asked me if I would go hunting once, and then he let me take it with me.

Q. Did he get it for you?

A. Yes, sir; he had it somewhere.

Q. Had anything been said about your gun up to that time?

A. He never let me have it before; I never asked for it, of course, but I never saw it until afterwards.

58 Q. Well, how long after this trage'y until you was given a gun and permitted to go hunting?

A. Probably about a month afterwards.

Q. What gun did you carry then?

A. My own.

Q. Did anything happen this gun of yours or any other gun after this shooting?

A. Once when we were coming from a hunting trip we wanted to break a piece of ice off in the river, and I put the rifle stock underneath it, and it split.

Q. You broke it?

A. Yes, sir.

Q. What became of Hurlin's gun?

A. It was there also.

Q. Where?

A. In the cabin.

Q. Did you ever have it in your hands?

A. I think that was the one I was using—anyway, he gave me one of them.

Q. Are you sure whether it was your gun or Hurlin's that was broken?

A. Why, I think it was Hurlin's, if I'm not mistaken.

Q. What became finally of the gun, if you know?

A. One gun Jack Black got; at least, he got the two, I believe; he bought Bird's gun, and the other one—I think the coal miners got that.

Q. Do you know who got Hurlin's gun?

A. I think the coal miners; I think they took charge of things, and I think they got it after we left the cabin.

Q. How long after the killing of Hurlin was it until you saw any person in that neighborhood other than your own party?

59 A. Why, we was there—well, some of those coal miners came down the next day, but I did'nt see them.

Q. How did you know they were there?

A. Why, Mrs. Strong told us; Bird saw them, I think.

Q. Had Bird given any directions to you or to Mrs. Strong, or both of you, as to what you were to do in the event that strangers came?

A. He told us that if anyone asked us where Hurlin went to tell them that he had gone down the river, or something to that effect.

Q. You say you didn't see these miners?

A. Not that day; no, sir.

Q. Were they the people that lived up at Dewey?

A. Yes, sir.

Q. How far were you from Dewey?

A. Dewey is about two and a half or three miles—two or two and *and* half, I guess.

Q. Who were these miners?

A. One named John Thompkins, another named Jim Welsh or Walsh—I don't know just which.

Q. When did you next see any person after that?

A. Why, we saw John now and then from that on—this John Thompkins—he would come down; and I think Hendricks was the next man we saw pass there, near Christmas time.

Q. How long after the murder of Hurlin was it until you saw John Thompkins?

A. It must have been a week or two.

Q. Was he the first man you saw?

A. Yes; he was the first, together with Jensen.

Q. Who was present at the time you saw him?

A. Bird.

60 Q. All the time?

A. Yes, sir.

Q. Was anything said by these people at that time or by either of them about anything?

A. No, sir; there was nothing said concerning Patterson or Hurlin at that time.

Q. Did they see Patterson?

A. No; there was Jack Black and John Thompkins and another man that came several times afterward, and inquired where Hurlin was, and we told him that he went down the river; and one of them asked Patterson what was the matter with him, and he said he had the rheumatism.

Q. Was Bird present when he made this inquiry of Patterson?

A. Yes, sir; he was in the cabin at the time.

Q. Did anybody get to see Patterson alone, or was Bird always present?

(Objected to by counsel for defendant on the ground that the same is leading.

Objection sustained.)

Q. Did you or Patterson, if you were present, ever meet any person when Mr. Bird was not present?

A. He was always present when I was present.

Q. How long was it after Patterson had been shot until this incident occurred?

A. Which?

Q. When he told the man he had rheumatism.

A. That was just before the river closed.

Q. I don't know when that is—how long afterward?

A. Well, some time afterwards.

Q. Can you give it in weeks, about?

61 A. It must have been four weeks anyway; the river was partly closed, or almost closed.

Q. Well, now, what was the next thing out of the usual course that took place at this cabin with reference to Bird—any more visitors?

A. Yes; we had—once there was a man coming up the river by the name of Mahoney, or Maloney; he stopped there and wanted to stop over night, and Bird told him he couldn't very well stop there—there was a lady living there, and he didn't care to take him in. Then there was John; he always came now and then. So, the latter part of the season, why, we had visitors there, and John came, of course, and whenever I could I would try to get a chance to tell him something about this thing, but I never got much of a chance. I would tell him what I wanted to do, and I made the remark once the first thing I knew I would be shot, and John says——

Q. Never mind what John said. Bird wasn't present, was he?

A. No.

Q. Why didn't you come right out and tell about these things that had happened there?

A. I didn't trust Bird or his wife, or Mrs. Strong, or even Patterson, because if I came out and told it they might have all got up and denied it all.

Q. Then, what was the reason you didn't divulge the story?

A. They might have denied it; I couldn't tell what they would do; I wouldn't trust any of them.

Q. How long did Bird remain at the cabin after the murder of Hurlin?

A. He remained there—well, him and John took a trip down the river towards spring, and while he was gone Mrs. Strong came out and told me I wanted to be careful, Bird was getting ready to shoot me—I had better watch out for him; so I told her——

62 Q. Did she tell you how he was going to do it?

A. Yes; he was going to take me over on the island where we used to go hunting and shoot me, and leave me—nobody would ever find me there.

Q. Well——

A. I told we had better get away and go and see these people up at the camp above; I wanted to get away some way or another but we didn't get any idea of what we should do or how we would get away, because we had nothing to get away with, no dogs, or snow shoes—so after awhile Bird and John came back.

Q. How long were they gone?

A. Two or three days, I think.

Q. After Mrs. Strong told you this, did that change your relations or in anywise influence you with reference to her?

A. I told her I would like to get away from there, and get Bob away, and I told her I would help her to get away if I could.

Q. Well, how long after Hurlin was killed, until he made the trip with John?

A. That was in the spring.

Q. Patterson was still there, was he?

A. Yes, sir.

Q. Now, how soon after that, if at all, did he leave the cabin again and go away?

A. During that time John had come up—John always come up now and then, and I told John that Patterson was likely to die and he said the first time he got a chance he would send down to the Mission, for the preacher there.

Q. Who was the preacher?

A. Chapman; and one day Hendricks passed by, and he told Hendricks—at least, I suppose he did, I don't know it.

63 Q. Who told Hendricks?

A. John did.

(Counsel for defendant *p*bject to what John told Hendricks—pure hearsay.

Objection sustained.)

A. And sometimes after that we were out hunting——

Q. Who?

A. Bird, Mrs. Strong, and I, going down the river looking for grouse, and we noticed a dog team coming away down the river, quite a distance, and he said, "There's somebody coming up," so we waited awhile and watched, and as they got up, coming right abreast of us, we went and hollered to them and they didn't answer, just went right along to the cabin. Then Bird hurried up, and went to the cabin, and got there before I did.

Q. What, if anything, did Bird say when he saw they were going to the cabin?

A. He said, "They're going into our cabin," and went to see who they were. He hurried on, I came behind him, and when I came in I found them in the cabin there, there was the preacher, Mr. Chapman, Mr. Blaine, and Black—they asked me if I remembered any of these people, and I told them yes, I knew Chapman and Black, and Patterson told me afterward——

(Objected to what Black told him, as hearsay.

Objection sustained.)

Q. Was this the only trip Bird made away, left the cabin, between the time of the murder of Hurlin and the coming of these people and when John went down?

A. No, he went away before this once or twice.

Q. Well, what was done there at this time?

A. Well, Chapman, and Blaine, and Black took Patterson down to the Mission—he came out and told me they were going to take
64 him down to the Mission.

Q. Who told you that?

A. Bird did; he said he didn't like the idea of a preacher doing that. He never said anything to them, I don't think; but Chapman stayed over night there, and the next morning they took Patterson, with a dog team, down to Anvik. And a few days afterwards—I don't know just how many—he was always inquiring to know whether Patterson would tell on him or not.

Q. Who?

A. Bird was—he seemed to be getting very anxious.

(Objected to by counsel for the defendant, as to what seemed to be the case, as immaterial.)

By the COURT. The witness may state what he said that would show any such thing.

By Gen. FRIEDERICHS. Give his words as near as you can, Mr. Sheffler.

A. He wanted to know if I thought Patterson would give him away, or tell on him.

Q. Of whom did he ask that?

A. Of me. I told him no, I didn't think so; and a little while afterwards there was a Swede boy came along—at least it was after John was there, and he had made a trip to the trading post, and he brought some provisions, and he left the dogs and went back down. During that time the preacher came, and after they had taken Patterson down this young boy, whatever he was—young Swede, I think—he came up and Bird made arrangements with him to go up the river—said he wanted to get away, thought it would be best to go away.

Q. Had Bird said anything previous to that about getting out of the country?

65 A. He said he thought he could get over the line before Patterson or any of those people could get word to the officers.

Q. Did he say why he didn't like the preacher coming there and taking Patterson away to the Mission?

(Objected to as leading.

Objection sustained.)

By the COURT. The witness may state what was said at the time—I think he has stated that.

By Gen. FRIEDERICHS. Did Bird, at the time they came and took Patterson to the Mission, when you say he stated that he didn't like to have the preacher do that, state any reason why?

A. Why, he said that——

Q. That is, did he state why he didn't like it?

A. He said we were able to take care of ourselves, he didn't like the preacher sticking his nose into our business—he didn't want to let Patterson go.

Q. Did he have any talk with these people, in your presence, about Patterson?

A. No, sir; not while I was there.

Q. Now state just what he said, Mr. Sheffler, as near as you can, with reference to getting out of there before Patterson could get word to the officers.

A. He said he thought he better get away from there, and wanted to know if I thought Patterson would tell on him. He said he thought he wouldn't, as he was a brother member of his, or something of that kind, and he trusted him a good deal; but he says, I think I better go up the river and get into Canada, and when this boy came up he made arrangements to leave with him, which he did.

Q. When was this?

66 A. A week or so after Patterson was taken down to the mission.

Q. What month would that bring it in?

A. In March, I think.

Q. Did he go away—he did, you say?

A. Yes, sir; he went away.

Q. How long was he gone?

A. Probably a week, I think. I don't know exactly how long he was gone.

Q. And he returned?

A. Yes, sir; he came back.

Q. Did he come back alone, or with the same boy?

A. He came back with another man one afternoon.

Q. Did he give any reason why he came back?

A. No, sir; he never gave us any reason.

Q. Did he make any statement concerning his trip?

A. None in particular; not that I remember. He told——

Q. Now, what he told was in your presence?

A. Yes, sir.

Q. Well, after he came back, what next happened?

A. I made arrangements with John, if he ever came back—well, I wanted to get away before he came back, if he ever did come back, and John said that he would never be back there, and John and I was trying to make some snowshoes with candles, and one day he told me——

(Counsel for defendant object to what was said by John as hearsay, not in the presence of the defendant, not binding.

Objection sustained.)

Well, John and I made arrangements that if he came back we would

go down to Anvik and get a dog team and get away, and as soon as he came back John went away, and came back with Black and the dog team.

67 Q. Did John leave before or after Bird returned?

A. The same night that he came back.

Q. Well, who came back with the dog team?

A. John and Black came back and he came in, and Bird was very disagreeable that day. Just before he came he was quarreling with the woman and one thing or another.

Q. Well, state what happened; that's merely a conclusion.

A. Well, that day he was abusing the woman. He was working around and he—once he took hold of her and shoved her in the door, and about a half hour after that we sighted this dog team coming, and he got very good and kind then, and it was Naomi this and Naomi that and everything, and very agreeable and nice. They went right on by and then came back, and John came down and they had a talk around, and finally they asked Mrs. Strong——

Q. Was Bird present?

A. Yes, sir—if she wouldn't like to take a trip to the trading post and get some canned goods and one thing another there, and she said she didn't mind if she did. Bird spoke up and said they would go in a couple of weeks; so they made that arrangement, and in a few days, as soon as the snow began to freeze down and get a crust on, Black and Bird and Mrs. Strong left for the trading post, and the morning we went down, after we got there to the camp, we hadn't been there at the cabin very long when Van Dote and a young fellow by the name of Mills came down the river, and he went out and met them——

Q. Who did?

A. Bird did. And during that time we held a council to see whether we would arrest him, and when he came back in we were all sit-

68 ting in the cabin, and Jack Black picked up his rifle and said he wanted to see if it wasn't getting rusty, and when he got it up he said to Bird that he could consider himself arrested. Bird began to holler and says, "O don't hang me now," and all that sort of things, and Black says to him, "Where did you put that other man that you killed?" he says to Bird, and he says, "Will you come and show us where he is?" and Bird says, "Yes; I'll go down and show you."

Q. What were the words he used about the other man?

A. He just said, What did you do with the other man?

Q. And Bird said, "Don't hang me now," you say?

A. Yes; when Black put him under arrest, he began to holler and wanted a chance to write home, and all that sort of thing.

Q. What Black tell him?

A. Jack says, "O, no, we won't hang you; we will take care and see that you don't get hurt."

Q. Did he tell him what he was going to do with him?

A. He told him he was going to turn him over to the soldiers; and we were there probably a week or so before the soldiers came up there.

Q. (By the COURT.) Where was that, Mr. Sheffler?

A. Fifteen miles below the trading post.

By Gen. FRIEDERICHS. But it was at the trading post that he was placed under arrest, you say?

A. Yes, sir.

Q. You had all gone down there following this invitation to Mrs. Strong to come down and have some canned goods?

A. Yes, sir.

Q. Well, how long did you remain at that place after he was put under arrest?

A. Till the soldiers came.

69 Q. Well, how long was it before the soldiers came?

A. Quite a little time; we began to get uneasy that they wouldn't get up there.

Q. How was word sent to them?

(By Mr. MALONY, for defendant. At this time we wish to object to those questions on the ground that it is immaterial when the soldiers got there, or whether they got there at all.

Objection overruled. Exception.)

By Gen. FRIEDERICHS. Can you recall about how long you remained at this station until——

A. Well, we stayed there quite a little bit, a week or so, before the soldiers came, and about that time Jim Helms and Blaince came up with them. Jim Helms was crippled from traveling, and we concluded to take Bird up first and have him show where he had buried Hurlin.

Q. Did you go up there with him?

A. Yes, sir?

Q. Did you and Hurlin and Bird, you say, all go back up to the cabin together?

A. No, sir; Tompkins, Blaine, Bird, and myself.

Q. And when you got up there——

A. Well, they got up there ahead of me. I had on a pair of trail snow shoes and they broke on me four or five hours before I got in and they got there ahead of me.

Q. Well, what occurred after you got there—to the scene of the shooting? Did he show them where Hurlin was buried?

A. I never seen him show them.

Q. Well, he started with the agreement he would show them?

70 A. Yes, sir.

Q. But you didn't get up there in time to see it; now, after this where did you all go, after the soldiers came?

A. We travelled on the ice; Blaine took Mr. Bird; Helms and Mrs. Strong and I travelled behind them on the ice.

Q. Where did you start for?

A. We started from Anvik on the ice; well, when we got to Anvik the snow had become very soft. We were going across to St. Michaels, but the weather got so soft we waited at the Anvik Episcopal Mission until it froze up again.

Q. Holy Cross Mission?

A. Yes, sir—oh, no; Holy Cross Mission is forty miles below. That was the Episcopal Mission at Anvik.

Q. Then did you come out to St. Michaels?

A. We waited until navigation opened. The river opened about the latter part of May some time, and we took a steamer. Blaine, Mrs. Strong, and I took a steamer down, and two or three soldiers and Bird went on another steamer down to St. Michaels.

Q. What time did you get to St. Michaels?
A. We got to St. Michaels in the middle of June.
Q. How long did you remain there?
A. From about the middle of June until October.
Q. Where was Bird in St. Michaels; who was he in charge of?
A. Of the United States marshal there.
Q. Who was the marshal there?
A. Mr. Vawter.
Q. He was then deputy marshal?
A. Yes, sir.
Q. Do you know of your own personal knowledge anything of what happened with reference to Bird?
A. A few days before we were to sail he got out of jail—broke out.

71 Q. How long was he out?
A. About four days, I think it was.
Q. Did you see the jail at the place out of which he had escaped?
A. No, sir.
Q. Do you know of your personal knowledge who went in pursuit of him after he got out?
A. Quite a number of men went after him, but an Indian came in and told where he was.
Q. Did the Indians trail him, do you know?
A. The Indian spied him, and Jim Helms and Jack Robinson, I believe, and Doctor Hagans, I believe his name was, went with the party.
Q. Now, who was the principle person you told of this crime, and when was it?
A. Do you mean to tell the whole thing in detail again?
Q. No; that you simply told of the murder of Hurlin by Bird.
A. Why, John Thompkins was.
Q. When was that?
A. I never could tell him all at once. I would tell him at times when I would see him—just hint how Patterson was hurt, and so on.
Q. Why didn't you come right out and tell him?
A. Because whenever I would tell him anything, he would begin to tell me it was none of his business, or something to that effect, and I was afraid to go any further with it.
Q. Afraid of what?
A. Well, I didn't know who he was—couldn't trust him, because things around there showed up so funny I wasn't going to trust anybody until I was sure of my ground.
Q. Was there anybody else there you was afraid of but John?
A. Why, I couldn't trust anybody until I knew more.

72 Cross-examination by Mr. MALONY:

What did I understand you to say your age was?
A. About twenty-six.
Q. How much do you weigh, Sheffler?
A. About two hundred pounds now.
Q. You weigh a lot more than that now too, don't you?
A. No, sir.

Q. Don't you weigh two hundred and twenty-five?
A. No, sir.
Q. Now, where did you first meet Patterson?
A. In New Orleans.
Q. What did I understand you to say his business was?
A. He was a printer, newspaper man.
Q. He ran a newspaper that is generally known as a blackmailing sheet too, didn't he?
(Objected to by counsel for the Government because the statement isn't true, and it isn't material to this case if it was true.)
By Mr. MALONY. If the court please, they brought out in their testimony on the trial what papers he worked on, evidently trying to show he was a reputable newspaper man. Now, it is perfectly proper for us to show what kind of a newspaper man he was.
By the COURT. All of that testimony had almost no relevancy at all to this case, and I should certainly have ruled it out if objection had been made. They brought out that this man was engaged in printing or in a printing establishment and jobbing, or something in connection
73 with it. You can ask what the newspapers were, if he knows, how long he worked there, and all that refers to the particular papers and let the jury decide as to the character of the paper; to ask if they weren't blackmailing sheets isn't cross-examination and isn't competent. Everything that is proper on cross-examination you can ask. Exception.
Q. What was Patterson doing at the time you first became acquainted with him?
A. Working in James Buckley & Co.
Q. Was he doing anything else in connection what that work?
A. I think he owned the Sunday Sun.
Q. Don't you know that he owned the Sunday Sun?
A. No, sir; I don't know it.
Q. And didn't you work up business yourself for the Sunday Sun?
A. No, sir; I didn't.
Q. How did you come to think that Patterson owned the Sunday Sun?
A. Because he employed the men there and I heard he owned it; I don't know.
Q. And you're one of the men he employed once in a while, aint you?
A. No, sir.
Q. The Sunday Sun was a paper that made it it's business for to hunt up when a married man went out with a lady on a lark; and if he put up money they wouldn't publish his name, but if he didn't they would publish it; isn't that true?
A. I don't know.
Q. You testified that before, didn't you?
A. No, sir.
Q. You testified it was a sensational paper?
A. Yes, sir.
Q. Didn't you testify that if a man was delinquent, as they say, and he wouldn't put up they would get square with him?
74 (Objected to by counsel for the Government as improper cross-examination.)

A. I don't think so.
Q. What did I understand you to say you were doing there?
A. Where?
Q. New Orleans?
A. I was working in the printing office.
Q. Were you also a newsboy around there?
A. At one time; yes, sir.
Q. Wern't you a kind of a "toot" out around the race course?
A. What do you mean by that? I don't know what you call a toot? How do you spell it?
Q. Well, sir——
By the COURT. You needn't answer that, Mr. Sheffler.
Q. Now, when did you first meet Bird?
A. In March some time, I think it was.
Q. Of what year?
A. 1898.
Q. How did you come to meet him, and under what circumstances?
A. I met him through an advertisement.
Q. Of what nature?
A. Asking for parties in a prospecting party, something of that sort; I don't remember the wording of it.
Q. Who inserted that advertisement?
A. Mr. Patterson.
Q. Who took it to the paper to have it inserted?
A. I don't know that.
Q. Didn't you do it yourself?
Q. Didn't you insert it yourself, or take it to have it inserted?
A. I don't remember.
75 Q. Didn't you testify at the last trial of this case that you took it there yourself, sir.
A. I don't remember.
Q. You wouldn't swear that you didn't take it?
A. No, sir.
Q. Patterson wrote it, didn't he?
A. I guess so; I wouldn't swear he did.
Q. And you wouldn't say that you didn't take it to have it published either, would you?
A. I don't remember all these little details.
Q. No, of course you don't. Now, did you get a reply to that advertisement?
A. We got several.
Q. Who got the replies?
A. Patterson.
Q. Did you see it?
A. No, sir; I never seen it.
Q. Well, how do you know he got it then?
A. Patterson told me he did.
Q. And what was the result of his receipt of that reply?
A. What was the result to who?
Q. Did anything further come from that reply?
A. Why, Patterson asked me to go and see who Bird was?

Q. Did you go?
A. I did.
Q. Where did you go?
A. To the Lumberman's Exchange.
Q. Was Bird a member of that exchange?
A. I don't know.
Q. Don't you know that he was?
A. No, sir.
76 Q. When you went there, what did you find out?
A. What do you mean?
Q. Did you find Bird?
A. Yes, sir.
Q. Where did you find him—inside or outside of the Exchange?
A. I don't remember; I think inside.
Q. Did you have any conversation with him?
A. I told him what I came for.
Q. Well, what did you tell him?
A. I told him that Patterson had received his answer to the advertisement, and that he would like to see him some time and have a talk on the proposition.
Q. Did you make any arrangement with him, appointing a time?
A. A time for what?
Q. To meet Patterson?
A. Yes, sir; I told him he might meet Patterson some time after he was through work in the evening.
Q. Didn't you state definitely any time?
A. He asked me what time he could see Patterson, and I told him in the evening after work.
Q. You did make a date at which he was to meet Patterson?
A. Yes, sir.
Q. Were you present at that meeting?
A. I was a while; yes, sir.
Q. You don't know whether you stayed there all that meeting or not?
A. No, sir; I don't just remember.
Q. Was there anything determined at that meeting in the line of this expedition?
A. No, sir.
Q. Nothing determined?
A. Nothing at the time.
77 Q. What did they do?
A. Why, they just spoke of different ways of going into the North.
Q. Nothing further than that done?
A. No, sir.
Q. When did you have the next meeting, if at all?
A. Quite a while afterward.
Q. Well, how long?
A. I don't remember the exact time.
Q. Were you present at that?
A. The next one after that first one?
Q. Yes.
A. I don't know.

Q. Well, you don't know about the time they had it, if you wasn't there, do you?
A. Mr. Bird went to Patterson's house, I think.
Q. When was the next meeting they had that you know of?
A. They had several meetings after that that I know of, but the time I do not know.
Q. Where did they meet the next time after the first time?
A. Why, they met out at Patterson's house.
Q. Who was present at that meeting?
A. Hurlin, Patterson, Bird, and myself.
Q. What, if anything, was arranged about the expedition at that time? Do you know?
A. They made a proposition, I think, to get a boat.
Q. Were you to put in your proportionate amount of that expedition?
A. Of the expedition?
Q. Yes, sir.
A. Yes, sir.
78 Q. What was the amount you agreed to put up for the expenses?
A. Each was to put in five hundred dollars, I believe.
Q. You agreed to put in five hundred dollars, did you?
A. I said I had some one to put it up for me.
Q. So you agreed to put in your share of five hundred dollars, did you, sir?
A. Yes, sir.
Q. And was present there with Patterson, Hurlin, and Bird when that agreement was made?
A. Yes, sir.
Q. And the others agreed to put in five hundred dollars each?
A. Yes, sir; of course we didn't know what it would cost, but that was the amount agreed on.
Q. Was there any final arrangement made at that meeting?
A. No, sir.
Q. When did you have the next meeting that you were present at?
A. Why, they weren't all together the next meeting, I think; sometimes there would be three, and sometimes two, and so on.
Q. Well, the meeting you were present at the next time?
A. When we were all together?
Q. Yes, sir; or some of you were present.
A. That was out at the house, I think.
Q. Out at whose house?
A. Patterson's.
Q. Was that after the meeting when Patterson, Bird, Hurlin, and yourself was present?
A. I think so.
Q. What was done at that meeting?
A. Nothing particular; they just spoke over the matter, and we was waiting for a communication—they were writing to the West.
79 Q. When and where was the final meeting held?
A. It was held in a saloon, I think.
Q. Who was present at that meeting?
A. Hurlin, Patterson, Bird, and myself.

Q. What was determined at that meeting?
A. It was determined that we would go.
Q. That who would go?
A. That we all would—Hurlin and I would go on ahead, and the other three would follow afterwards.
Q. All the final arrangements were made at that meeting?
A. That we would go? Yes, sir. There wasn't ever any final arrangements made that I know of.
Q. Isn't it a fact that it was determined at that meeting that all would put up—or at least 'at Bird and Patterson would put up a forfeit of a hundred dollars each as a forfeit that they would go?
A. I don't remember that.
Q. Don't you know that such was the case?
A. No, sir; I don't.
Q. After you had determined that you and Hurlin would lead on, what was done next?
A. They went and bought some tickets.
Q. Who bought those tickets?
A. Bird bought those tickets.
Q. At the time Mr. Bird bought the tickets, did he pay down to Patterson a hundred dollars as a forfeit at that time?
A. I don't think he did; he bought the tickets is all he done that I know of.
Q. How much did those tickets come to?
A. Forty dollars apiece, I think.
Q. Didn't you see Bird lay down a hundred dollars forfeit at the time he bought those tickets?
80 A. No, sir; I only know he paid for the tickets, and took a receipt for them.
Q. Did you pay any money at that time for a ticket?
A. No, sir.
Q. Did Patterson put up the money to you the same time as the tickets was bought?
A. He gave me a check the next day, I think it was, for ninety dollars.
Q. Before this time, don't you know that Bird had already bought the tickets and made the arrangements for all your party to go to San Francisco?
A. No; I don't.
Q. Don't you know that while you were waiting for the agent to come in, that Bird explained that to you, and that was the reason he was paying for the tickets, that he was putting up a forfeit?
A. He was trying to get cut rates, I believe, and they were talking about tickets——
Q. And Bird was the one that was carrying on the arrangement?
A. Yes, sir.
Q. Now then, you and Hurlin started for San Francisco?
A. Yes, sir.
Q. How much money did you have at the time?
A. Ninety dollars the next day——
Q. That Patterson gave you?
A. Yes, sir.

Q. You left New Orleans what date?
A. At the beginning of April—I don't remember the exact day.
Q. In the meantime, had you ever met this Mrs. Strong?
A. Once, yes.
Q. You met her, you stated, at your father's house?
A. Yes, sir.
81 Q. Will you swear that Bird introduced her to you at that time as his wife?
A. I couldn't swear to that; I have that impression though.
Q. Do you remember testifying to the court and jury a few moments ago that he did introduce her as his wife?
A. I think he did.
Q. But you won't swear he did?
A. I don't remember that exactly; no.
Q. You simply stated that before for to injure Bird, didn't you?
A. No, sir; I thought he did.
(Court adjourned until two p. m.)

JUNEAU, 2 p. m., same day.

CHARLES SHEFFLER recalled for further cross-examination.

By Mr. MALONY:

Mr. Sheffler, prior to your departure from New Orleans did I understand you to say that it was agreed between you that you would put up five hundred dollars apiece for this expedition?
A. Yes, sir.
Q. And you didn't put up your share?
A. No.
Q. Was anything said to Bird prior to your departure from there about your share of this money?
A. Yes, sir.
Q. State to the jury what it was.
A. As I stated this morning, I told them that I wasn't able to get the man to put up the money he promised to grub-stake me; Bird and Hurlin was together, and I saw Patterson after that, and they agreed to have me go along anyway.
82 Q. Who did?
A. Bird and Patterson.
Q. And Hurlin?
A. Yes, sir.
Q. As a matter of fact, wasn't the first intimation that Bird had that you hadn't put up your share of that money was when you were on your voyage from San Francisco to St. Michaels?
A. No, sir.
Q. Did Hurlin and Patterson agree to put up your share?
A. They agreed to have me go along. I don't know who was going to put up the expenses.
Q. Was anything ever said about who was to put it up?
A. No; they were to fix it up together.
Q. Do you know whether Patterson or Hurlin ever put up anything for you?
A. I know they put up a certain amount of money.

Q. How much was the cost of that outfit, if you know?

A. About two thousand dollars, I think.

Q. Of that amount, how much did Hurlin put up?

By the COURT. Mr. Malon'y, what has that to do with the question one way or the other?

By Mr. MALON'Y. I want to show that Patterson and Hurlin never put up anything for this man.

By the COURT. Well, what does that contradict?

By Mr. MALON'Y. We want to see on what basis this gentleman was in that party.

By the COURT. It doesn't make any material difference whether he put up anything or not, as bearing on the case.

By Mr. MALONEY. They brought this testimony out. We didn't.

83 By the COURT. You didn't object to it, or I would have certainly ruled it out. There is no reason why the cross-examination should extend to those matters, or that will allow you to travel outside of the case, or what was brought out on examination in chief.

By Mr. MALON'Y. It will become material in this way: At the time before this occurrence these men called for three-fifths of the provisions and outfit on the division that they wanted, and Bird disagreed to that on the ground that he had put up more money than the others, and this man had put up absolutely nothing. This is to show just what the cause of that quarrel was.

By the COURT. You may do that if you keep within the bounds of reason and don't travel clear outside of the case.

Q. How much money did Hurlin put up?

A. About five hundred dollars.

Q. Don't you know, as a matter of fact, that he only put up four hundred and sixty-five dollars?

A. I don't know, but it was about five hundred dollars.

Q. And don't you know that Patterson put up only four hundred and forty-three dollars?

A. I don't know.

Q. Do you know who put up the balance?

A. Bird and Mrs. Strong, I think.

Q. Don't you know that Mrs. Strong never put up a cent?

A. No.

Q. Do you swear that Mrs. Strong put up anything on that trip?

84 A. No, sir; because I don't know positively.

Q. Did you testify on the last trial that Mrs. Strong put up anything?

A. She told me she put up three hundred dollars.

Q. Didn't she afterwards tell you that she put up nothing?

A. No, sir; not that I remember of.

Q. (By the COURT.) Gentlemen, are there any witnesses in the court room since the morning session that should be excluded?

By Mr. KELSEY. I am, your honor.

By the COURT. Do counsel desire that Mr. Kelsey retire?

By Mr. MALONEY. We don't care particularly about Mr. Kelsey. We suppose he will simply testify as to these notes in the other case.

By Gen. FRIEDERICHS. The Government has no objection to Mr. Kelsey remaining. We don't require the rule to be applied to him.

By Mr. MALON'Y. Now, Mr. Sheffler, when did you leave San Francisco?

A. About the 21st of May—about that.

Q. And you arrived at St. Michaels?

A. On the fourth of July, I think.

Q. And when did you arrive at the place you built your cabin at?

A. The beginning of September, I think.

Q. State to the jury if there was any discussion about stopping at that place—about where you would make winter camp.

A. Well, Bird didn't want to stop there.

Q. Bird objected, did he?

A. Did the others insist on staying at that place?

A. They got tired of travelling; they were going so slow, and
85 we thought it would be better to go into winter camp.

Q. In that matter they overruled Mr. Bird, and stopped there anyway—is that true?

A. He finally agreed to stop.

Q. When you arrived there the feeling was fairly friendly between all of that party, considering the distance you had travelled, wasn't it?

A. As friendly as it could possibly be; but it wasn't very friendly with him, I don't think.

Q. Now, will you please state what you know, and not what you think. Apparently everything was friendly between you, wasn't it?

A. When we started to build the cabin—yes; it wasn't very agreeable, but we thought we could possibly get along.

Q. (By Mr. MALIN'Y.) I now desire to ask that two plats which were introduced in evidence at the last term of this court and were filed in this case—and they are missing from the files—I now desire that they be returned, as I wish to use them with this witness.

By the COURT. The court doesn't care particularly for them; they may be produced, however, if they can be had.

By Gen. FRIEDERICHS. If the court please, I had the files in this case, and I returned to the clerk exactly what I got. These were not among the files.

By Mr. MALONEY. Well, you started to build a cabin there, did you, Mr. Sheffler?

86 A. Yes, sir.

Q. When was the first time you ever had any conversation, if you heard any, that took place between Hurlin and Patterson in regard to their separating from Bird?

A. Between who?

Q. Well, between yourself, Patterson, and Hurlin.

A. When the cabin was nearly finished.

Q. How long before the 27th of September was that?

A. That might have been three or four days before; I don't remember.

Q. What was that conversation?

A. Why, Hurlin came up——

By the COURT. Who was that between?

By Mr. MALONEY. Between Hurlin, Patterson, and himself in regard that their separating.

By the COURT. Has testified there was any conversation?

By Mr. MALONEY. He testified they were going to divide up and separate.

By the COURT. The conversation is not competent under that statement.

Exception.

Q. That was three or four days before the 27th, you say?

A. Yes, sir.

Q. What had you determined on doing at that time?

A. Why, moving further down from there.

Q. You determined to move further down from there—did you tell Bird about that determination at that time?

A. That night; yes, sir.

Q. What did you tell him?

A. Hurlin told him, I believe; I didn't tell him anything.

Q. Were you present at the time Hurlin told him?

87 A. Yes, sir.

Q. What did he tell Bird?

A. He told Bird he thought it would be better if we would separate, because things weren't very agreeable, and to put in a winter the way we were would be pretty bad.

Q. What did Bird say to that?

A. He said he didn't care.

Q. He raised no objection?

A. No, sir.

Q. Didn't he state at that time he didn't care, provided they divided fairly?

A. He said as long as he got his share of the provisions, he didn't care; it was immaterial to him.

Q. Didn't he suggest to you at the time to send for the miners at the coal camp to arbitrate the matter between you in making that division?

A. Not while I was present.

Q. Did he at any time?

A. I don't know.

By the COURT. Did he suggest it to you or in your presence at any time?

A. No, sir; he didn't.

Q. Did Hurlin ever tell you that he did?

By the COURT. You needn't answer that, Mr. Sheffler.

Exception by counsel for defendant.

Q. Do you know of your own knowledge that Bird did make such a request as that?

A. No.

Q. When did any other conversation take place prior to the 27th of September, in regard to your leaving and dividing the provisions?

88 A. I don't know of any.

Q. Don't know of any conversation taking place. Didn't one occur just the evening before?

A. That's the one I was speaking about a while ago.

Q. And you state that was three or four days before—is that the one?

A. Well, that was the beginning.

Q. Well, and the evening before?
A. Yes; of course there might have been some between Bird and Patterson and Hurlin.
Q. Were you present at any such?
A. No sir; I was on the bank of the river—just heard them speaking.
Q. Can you tell anything of what they said?
Q. I didn't hear everything; I can only relate that they were talking about dividing the provisions is all.
Q. Did you hear Bird at that time suggest sending for John?
A. No.
Q. Then there was no difficulty occurred up to the night of the 26th, to speak of?
A. No, sir; not in particular.
Q. On the morning of the 27th, about what time did you get up?
A. I couldn't tell you, we never had the right time; got up early, according to the daylight we had.
Q. When you got up what was the first thing you done?
A. One of us made coffee.
Q. After you had your coffee, what then?
A. Why, Bird got up, and went to the cabin and went to work.
Q. What were the rest of you doing?
A. We were up there cutting some rollers.
Q. What were you cutting rollers for?
A. To get the boat off the beach with.
89 Q. The boat you were going to take away from Bird, was it?
A. Yes, sir; the boat we were willing to take—wanted to.
Q. What boat was that, the launch or the barge?
A. The barge.
Q. Where was Bird during the time you were cutting rollers for to get the boat off the beach?
A. I think he was down in the boat, or in the cabin, I don't know just where.
Q. After you had cut the rollers, what did you do next?
A. Why they sent me up to tell Bird that we were preparing to lay the goods out on the beach, and getting ready.
Q. Sent you up after Bird?
A. Yes, sir.
Q. When you went up to the cabin after Bird, what did you tell him?
A. Told him that we wanted to leave, and would like to have him come down.
Q. What reply did Bird make to that?
A. He said all right, he would be down shortly.
Q. How long after that was it that Bird came down?
A. I don't know—couldn't say. It wasn't very long.
Q. About how long?
A. It might have been fifteen minutes.
Q. When Bird came down what was Patterson and Hurlin and yourself doing?
A. Patterson was in the boat, I think; and Hurlin and I was laying brush on the beach to put the goods on.
Q. Up to that time, so far as you know, you say nothing was said about dividing the privisions—as far as you can relate?

A. Yes, sir; that's right.

Q. Yet you were around there all that time?

A. Yes, sir.

90 Q. When Bird came down, what was said then about dividing, if anything?

A. Wasn't anything, just then, said; he went into the boat and we were called to breakfast about then.

Q. Nothing was said to him?

A. Unless it was some usual remark—he didn't pay any attention to it.

Q. Nothing was said about dividing at that time—that true?

A. Nothing particular.

Q. You proceeded to breakfast then, did you?

A. Yes, sir.

Q. During the time you were eating was anything said about dividing the provisions then?

A. No, sir.

Q. Who went on board the boat first—you, Bird, or Patterson?

A. I think Patterson was on board; Hurlin went on, and then I went on after him.

Q. Bird was the last on board, then?

A. Bird went on before Hurlin and I went on.

Q. What was Bird doing, did you say, when you and Hurlin went on board for breakfast?

A. When I went on and went to breakfast he was looking through a gripp there.

Q. What was he doing with that gripp?

A. He was looking at some papers.

Q. Did you see the papers?

A. No, sir; not particularly.

Q. Would you know them if you saw them?

A. I don't think I would; never saw them.

Q. Do you know Patterson's handwriting?

A. I wouldn't remember Patterson's, I don't think.

Q. Would you know Hurlin's?

91 A. I couldn't say whether I would or not.

Q. You had been with them a great deal?

A. Yes, sir.

Q. What kind of papers was Bird looking over when you saw him?

A. Ordinary writing paper, bills, or something of that sort.

Q. Had them out of the valise, did he?

A. Had them all in his hands.

Q. Did he say anything concerning those papers at all?

A. Not while I was with them he didn't.

Q. Said nothing to you about the amount you had put into the deal?

A. No, sir.

Q. Neither Hurlin or Patterson said anything to him about it?

A. No.

Q. Do you recognize that as Hurlin's handwriting? [Showing witness paper writing.]

A. Yes, sir; I think that's his; I'm not positive, though.

Q. Do you recognize that handwriting? [Handing witness paper.]
A. No, I don't; they never used such paper as that, though; never had any paper like that on the barge that I ever saw.
Q. Will you swear they never had any paper like that on the boat?
A. I never seen any.
(Objected to as not proper cross-examination; objection sustained.)
By Mr. MALONY. We now desire those plats that were introduced as part of the record in the last trial of this case. Where is Mr. Hills?
(Mr. Cobb goes out for Clerk Hills; returns.)
By Mr. COBB. Mr. Hills says he has made thorough search of the office and he can't find them.
92 By Mr. MALONY. I would like to have Mr. Hills called, for a question or two.
Q. Mr. Hills, there were some diagrams in this case in the last trial admitted in evidence. Do you know where they are?
A. I don't know anything about them. They are not with the files now.
Q. Who, if anyone, if you know, took them out of the papers?
A. No one; those files have been kept together. There was a package of testimony turned over to Gen. Frederichs. Aside from anything else, it has never come into my hands at all.
Q. Was there any papers besides just the testimony turned over to Gen. Frederichs?
A. That's all; it was turned over to Mr. Gibson.
Q. Have the regular files been out of court?
A. I don't think they have, excepting when I took them to Skaguay for the trial there.
By Mr. MALONY. I would like to have those plats looked up. They were admitted by both parties as a diagram in the case.
By the COURT. The Court is under no obligations to look them up. They were left in charge of the man who was clerk at the time. If they have ever been turned over to Mr. Hills he will have to account for them.
By Mr. HILLS. There is a package in the back room marked "Effects of Hurlin and Patterson"—that's all I have.
93 By Mr. COBB. The stenographer in the last trial, Mr. Kelsey, tells me they were marked "Exhibits" and filed in the other trial.
By Mr. MALONEY (to Witness Sheffler). Who drew this plat?
A. I think Doctor Wilbur.
Q. Who is Dr. Wilbur?
A. He is a physician in Skaguay—last term of court.
Q. Draw it under your directions, did he?
A. Yes, sir; he got some suggestions from me—he drew it.
Q. What was the length of that boat?
A. Thirty-two feet.
Q. What was the width?
A. About seven feet beam.
Q. Wasn't it just six feet wide?
A. No, sir.
Q. Was it wider in the center than it was at the stern?
A. Yes, sir.
Q. The bow came to a point, as represented here?
A. About like that; yes, sir.

By the COURT. Is that the scow?

By Mr. MALONY. Yes, sir; on which the shooting occurred. Now, Mr. Sheffler, do you remember seeing a diagram offered in evidence here the last term of court which was used——

A. I don't e'actly remember how it was, but I remember there was one in the last case.

Q. Now, what is this round thing here supposed to represent?

A. The water barrel.

Q. About what was the width of that boat at the stern?

A. I couldn't tell you. It tapered from the middle from seven feet down.

Q. Well, about what was the width?

94 A. I couldn't say. It might have been six feet, and it might not have been.

Q. Don't you know it wasn't six feet?

A. I don't know.

Q. About how wide was it?

A. I said it might have been six feet; maybe more, maybe less.

Q. Where was this barrel sitting with reference to the stern of the boat?

A. About where it is now on that plat.

Q. What is this marked "4?" What does that represent?

A. That's the seat.

Q. How wide was that seat across here?

A. That was rather wide; I can't say just how wide.

Q. About how wide?

A. It must have been over a foot and a half—very wide seat, anyhow.

Q. How wide was the space between this seat and where you folks sat on this bench or board here?

A. I don't know; must have been two or three feet. It was a little more than two feet; a person could sit in there, and another person could sit on the other side—it was very tight.

Q. Between two or three feet?

A. It might have been more; I don't know exactly.

Q. When you sat on here, and the woman, Mrs. Strong, sat over here, did your knees touch?

A. Very near it; didn't quite touch, I guess.

Q. That, you say, was between two and three feet in width?

A. Might have been; yes, sir.

Q. What was the size of this barrel?

A. I don't know.

Q. Forty-gallon barrel, wasn't it?

95 A. I don't know the measurement of barrels.

Q. Was it a sort of a half a barrel—about half size?

A. It looked like a small whiskey barrel?

Q. About what was the dimensions of the whiskey barrel?

A. It wasn't very large.

Q. Was it two feet through?

A. O, no; that's a hogshead, I believe.

Q. Is two-feet diameter a hogshead?

A. Mighty near it.

Q. How great would be the dimensions of that?
A. The barrel?
Q. Yes, sir.
A. I don't know; not very large.
Q. Wasn't that a ten-gallon keg?
A. It was a barrel, not a keg.
Q. Would you say the dimensions was less than two feet?
A. Yes, the head.
Q. Eighteen inches?
A. It might have been smaller.
Q. And it might have been larger?
A. It wasn't a very large barrel.
Q. As a matter of fact, didn't that barrel fill that entire space on that side between the seat and this board you used as a seat in the stern there?
A. No; You could get between the barrel and that seat.
Q. How much space was there between the seat and that barrel?
A. There wasn't very much space that I remember of.
Q. How much space?
A. You could stand up behind it there.
Q. Could you sit down behind there?
96 A. You could if you would try, I guess.
Q. So this plat don't fairly represent the conditions as they were there at the time?
A. It gives a pretty good idea of the location of things, yes.
Q. And that's all; so, as a matter of fact, this round thing extends clear over to here?
A. Very near; yes, sir.
Q. Just take a pencil there and mark how far it would extend?
A. It extends very near over—the bottom is over there, very near [indicating].
Q. Then this space isn't the size it ought to be?
A. It don't appear to be exactly.
Q. Not in comparison with the barrel?
A. No.
Q. Now, what is this here, marked "grub box," supposed to be?
A. That's a box.
Q. About what was the dimensions of that box?
A. It was made out of one of those "Pilot" bread boxes.
Q. About the length?
A. I couldn't tell you—a good-sized box.
Q. Was it three feet?
A. It might have been, and it might not; I know it was made out of a Pilot bread box.
Q. And that was on this seat that ran across here?
A. Yes, sir.
Q. Now, as I understand your testimony, all three of you men sat between the Pilot bread box and the side of the boat there?
A. Yes, sir.
Q. About what was the width from the box to the side of the boat?
A. I couldn't say; three of us sat in there, and it was a pretty tight fit.

97 Q. Well, about what was the distance, if you know?
A. I couldn't tell you exactly what space we took.
Q. The whole boat wasn't over six feet wide at that place?
A. It might have been—I don't know.
Q. And the bread box was about three feet?
A. It was standing on the seat—I don't know how many feet it would occupy.
Q. You said it was in the neighborhood of three feet?
A. Somewhere in that neighborhood.
Q. And the three of you sat in that space, between the bread box and here?
A. Yes, sir.
Q. Who was sitting at this outer edge of the boat?
A. Patterson.
Q. Who was in the center?
A. I was.
Q. And Mr. Hurlin?
A. Was next to the grub box.
Q. Now, where was Mr. Bird—never mind that; I will first ask you where your beds were on this boat as represented here?
A. The first one in the bow was my bed.
Q. Where was that, here [indicating on plat]?
A. No; it is marked there "bunk."
Q. The one marked bunk, the first one, is yours?
A. Yes, sir.
Q. And the next one?
A. That's Hurlin's.
Q. Where was Patterson's?
A. That is his [indicating].
Q. And this one here is supposed to be——
A. Mr. Bird's and Mrs. Strong's.
98 Q. Now, all the time you was sitting down there, where was Bird?
A. While we were sitting there—well, I don't know; he was sitting in there somewheres.
Q. You saw him when you came in?
A. Yes, sir.
Q. Sitting down or standing up?
A. Kneeling down, I think.
Q. Where?
A. On that bunk there—his bunk.
Q. How far from that seat would that be?
A. Three or four feet, I suppose—couldn't tell you exactly.
Q. He was still sitting there when you sat down?
A. When I went through to sit down; yes, sir.
Q. Where was Bird's gun, the shotgun, kept?
A. Usually hung on the side by the bunk there.
Q. Where was it that morning?
A. I think it was hanging there.
Q. Do you know whether it was or not?
A. I'm almost sure it was.

Q. Don't you know, as a matter of fact, it was behind the water barrel over here [indicating on plat]?

A. No, sir; I do not.

Q. Where was your gun?

A. Up in the bow of the boat here [pointing] under the canvass.

Q. Where did you get that gun?

A. I bought it in San Francisco.

Q. Wasn't that Patterson's gun and not yours?

A. No, sir.

Q. Whose money did you buy it with?

A. Hurlin's.

(Objected to by counsel for Government as immaterial.

Overruled.)

99 Q. Did Hurlin give you that gun?

A. Yes, sir.

Q. As a present, I suppose?

A. If he gave it to me, it must have been a present.

Q. Where was Hurlin's gun?

A. Well, his gun usually laid aft, in the back—it was all over the boat at different times; we moved our bunks so often; we used to be sleeping on these bags and it would get pretty bumpy and we had to change the bumps pretty often.

Q. Do you know where Hurlin's gun was that morning?

A. No, sir.

Q. Your gun was at your bunk, you say?

A. Yes, sir.

Q. Was it loaded?

A. Yes, sir; always loaded.

Q. Was Hurlin's gun loaded?

A. Always; I think it was.

Q. You know it was, don't you?

A. We generally carried the magazines full.

Q. It was loaded that morning?

A. I don't know.

Q. It was always loaded, wasn't it?

A. Unusually, yes, sir; generally shot geese and things as we went along the river.

Q. When you three men sat down you started to eat your breakfast; now, those things you call bunks, those are just sleeping bags on the goods, on the top of things there, not regular-made bunks, were they?

A. No, sir.

Q. Now, Mr. Sheffler, you proceeded to eat your breakfast after sitting down there?

A. Yes, sir.

100 Q. What was the first intimation you had that any trouble was about to take place?

A. I was talking with Mrs. Strong about catching some grouse—chickens, we called them at the time; didn't know what they were—and I saw all at once a frightful expression on her face, and as I turned to look a shot was fired——

Q. Did another follow?

A. Not very long after.

Q. How long?
A. Well, time for another shot.
Q. You testified on the last trial that it went "boom! boom!"—like that.
A. Well, I don't know just how fast.
Q. Very rapidly one followed the other?
A. Yes, sir.
Q. Did you see where Hurlin was shot?
A. No, sir.
Q. Do you know where he was shot?
A. No.
Q. Did you see where Patterson was shot?
A. Yes.
Q. Will you point out to the jury on my back here [turning to witness] where the shot took effect on him?
A. He was shot right about—stand still—shot right in about here somewhere.
Q. The lower blade of the left shoulder?
A. Yes, sir; and came out there.
Q. At the top of the s'oulder?
A. Yes, sir; and a couple of shot went right up there in the jaw and one came out the side of the nose here.
Q. State to the jury what kind of a wound that made—did it tear right up through.
101 A. It made a big wound in the shoulder, and the shots in the jaw weren't very large—went in about there [indicating].
Q. In what position was Hurlin at the time the shot struck him?
A. When I saw him—when the shot was fired, I just turned to look to see what was Mrs. Strong looking at, and I don't—I think he was about to look at the time——
Q. State to the jury what position he was in—that's what I am asking about.
A. Well, I'm trying to state.
Q. Well, demonstrate it, can't you?
A. We were sitting eating, and he turned to look, and I did too.
Q. Did he remain in the seat when the shot was fired?
A. His head dropped down like that [dropping chin on breast].
Q. In what position was Patterson at this time?
A. I couldn't tell you; he was about—just stooping like this when the shot was fired.
Q. Did you see Bird about that time?
A. No.
Q. Did you see him when you turned around?
A. Yes, sir.
Q. Was he standing up?
A. He couldn't stand up straight for the cover of the boat.
Q. In what position was he?
A. He was sort of stooped and was backing out of the boat.
Q. Still up on his feet, was he?
A. Yes, sir.
Q. In what position was his gun?

A. He raised the gun to his shoulder, and told me to stand there—any way he raised it up, I don't know whether he put it to his shoulder or not now.

Q. He was standing when you first saw him after the shooting, how far from Patterson?

102 A. Patterson had moved when I seen him; he was out in there somewhere [indicating on plat].

Q. Bird was?

A. Yes, sir.

Q. About how far was that from that seat?

A. Well, I don't know; the bunk is about seven feet. I don't know how far he would be.

Q. And he was standing out here [indicating on plat]?

A. Little farther back than that.

Q. About how far would you say that would be from Patterson?

A. Well, I don't know; couldn't tell you.

Q. Do you remember testifying it was about four feet at the last trial?

A. It might have been that, and it might have been more. I couldn't tell you now.

Q. You have seen that shotgun a number of times?

A. Yes, sir.

Q. What was the length of the shotgun?

A. I don't remember that if I ever knew.

Q. An ordinary shotgun is from thirty-four or thirty-six inches?

A. It wasn't a very long shotgun or a very short one.

Q. Was it a gun of about thirty-six inches of length, would you say?

A. I couldn't tell.

Q. Would you say it was less?

A. I wouldn't say it was less; no.

Q. Would you say it was six feet long?

A. No; I have never seen anything of those guns yet.

Q. Would you say it was three feet?

A. I'm not positive.

Q. If Bird had been standing in the neighborhood of four feet

103 and had raised the gun up to his shoulder this way, that would bring the end of the barrel almost to Patterson wouldn't it?

A. Very near it; yes, sir.

Q. And yet you say the shot was discharged upward and came out at the shoulder?

A. Some of them; yes, sir.

Q. Did it tear the flesh up so you could see the surface?

A. No, sir.

Q. Went under the flesh and came out, did it?

A. Yes, sir; some of it, and some of the shot came through the jaw and one or two out through his nose.

Q. Do you wish to be understood that he discharged—do you know what kind of shot that gun was loaded with?

A. I think it was BB. I'm not sure.

Q. That's good-sized goose shot, isn't it?

A. I think it is.

Q. And when the gun was discharged, he was standing only about four feet from Patterson?

A. I wouldn't say.
Q. After Patterson was shot, where did he go next?
A. He went out the stern of the boat.
Q. That was over the water, was it?
A. Yes, sir.
Q. Did Bird fire at Patterson again?
A. Not at that time.
Q. How long afterwards was it that he fired again?
A. Very shortly afterwards, from the outside of the boat.
Q. How far was he from Patterson at that time?
A. I couldn't see.
Q. Do you know whether Bird hit Patterson at that time?
A. I don't know.

Q. Don't you know as a matter of fact that only two shots
104 were fired, and that he never fired a third shot at all?

A. He fired a third shot; yes, sir.
Q. And you're very sure he hit him the first shot?
A. He was wounded when he went out of the boat.
Q. And he had no other wound except as you have described on the shoulder and face?
A. Yes, sir.
Q. Now, then, Mr. Sheffler, after Patterson was shot what, if anything, was said by Bird?
A. Why, Patterson kept on begging, and he wanted to know what he did it for, and Bird said: "I didn't mean to shoot you," or something like that; that he was sorry he had to do it, or sorry he did it.
Q. Wasn't the exact words that Bird said: "Patterson, I'm sorry I had to do this?"
A. I don't think so; sorry he had done it, I think.
Q. It might have been that he was sorry he had to do it?
A. He might have said that; yes.
Q. At that time, when this all was going on. and after the shooting. did you not say to Bird: "They asked me to join in with them in case of any trouble and I wouldn't do it?"
A. No, sir; he asked me—he says——
Q. Answer that question, yes or no, sir.
By the COURT. Let the witness complete his answer.
A. He said to me: "Were you going down with them?" and I says "yes"—no, he didn't put it exactly that way; he says: "Were all you three together?" and I says "yes," and then he said something about me leaving; anyhow I said "yes" to everything he said; I had to, to keep him from turning on me.

Q. Didn't you say, in the presence of Mrs. Strong and Patter-
105 son, that they asked you to join in with them in case of trouble?

A. I don't remember.
Q. Did they ever ask you to do that?
A. Who?
Q. Patterson and Hurlin.
A. No.
Q. And you never stated that they did at that time?
A. No, sir; not that I ever remember of.

Q. If you had you would remember it, wouldn't you?
A. I think so.
Q. After the shooting took place what did you do with Patterson?
A. Bird and I took Patterson up the hill to the cabin.
Q. Before they went up did you say Bird and Patterson shook hands, or something to that effect?
A. Yes, sir.
Q. Who assisted Patterson?
A. Bird and I.
Q. Where were the guns at the time?
A. I think Bird had one; I don't exactly remember.
Q. Didn't the woman go up with you at that time?
A. I don't know whether she did or not that time; if she was behind I didn't see her; I wasn't watching the woman then.
Q. Didn't the woman go up at that time and carry both those guns?
A. She might have.
Q. Did you hear Bird tell the woman to keep the guns away from you—that you might grab one?
A. No, sir.
Q. Bird assisted you in taking care of Patterson, you say?
A. A little; not very much, though.

Q. Now, when did you first see anyone after this shooting took
106 place, outside of those in your own party?
A. I saw John, I think, was the first.

Q. John who?
A. John Thompkins.
Q. When was that you saw him?
A. Might have been—I think a couple of days afterwards.
Q. Don't you know it was the very next morning?
A. No.
Q. How many days afterwards was it?
A. There was somebody there, but I didn't see them.
Q. When; the next morning?
A. Yes; it might have been the next day.
Q. Where were you that you didn't see them?
A. In the cabin.
Q. Who was outside?
A. I don't know—I think Mrs. Strong was.
Q. How did you know there was anybody out there?
A. I could hear them talking.
Q. Did you know who it was?
A. No, sir; not at the time.
Q. Didn't you know it was John?
A. I knew it was afterwards; yes.
Q. Didn't you know it, as a matter of fact, at that time?
A. No, sir.
Q. Now that morning that John came up there, didn't Bird say in the presence of you and Mrs. Strong and Patterson that he was going to give himself up?
A. No.
Q. Did not you and Mrs. Strong and Patterson advise him not to give himself up?

A. We never said that in front of John.

107 Q. I'll ask you, sir, if it isn't a fact that he did state that in the presence of John when he came—that he was going to give himself up?

A. No.

Q. Now, I'll ask you if you and Mrs. Strong and Patterson did not advise him not to give himself up?

(Objected to by counsel for the Government as not proper cross-examination.)

Objection sustained. Exception.

Q. (By the COURT.) You can not ask that question except for purposes of impeachment. If that is the purpose of the question, and you so state, you may ask it.

By Mr. MALONY. That is just the purpose of that question, if the court please.

Q. You state that you did not so advise them?

A. Not in the presence of John.

Q. Well, did you in the presence of anybody?

A. Bird. Mrs. Strong and Patterson and myself was there, and Bird kind of said he thought he would give himself up. He wanted to see what we were going to say, and we told him not to do it.

Q. You admit then that you did advise him not to?

A. We couldn't do otherwise.

Q. You denied that on the last hearing, didn't you?

A. What?

Q. That you advised him to not to give himself up.

A. He asked should he give himself up.

Q. Who made the reply to that advising him not to?

A. Patterson was the one that told him not to go down to those men and make a scene.

Q. What did you tell him to do?

108 A. I never told him anything.

Q. You didn't advise him at all?

A. No, sir.

Q. Did you hear Mrs. Strong say anything to him about it?

A. I heard Patterson; not her.

Q. You and Mrs. Strong were both present?

A. I think we were.

Q. Don't you know that you were?

A. I think so; several times.

Q. When you heard Patterson advise him not to give himself up, what did Bird say to that?

A. Didn't say anything—just listened.

Q. Did you ever, at any time, advise him not to give himself up?

A. Not that I remember of. At times he would ask me, when I was alone, if he ought to give himself up and that sort of thing, and I would tell him no—I would be a fool if I did otherwise.

Q. When did you first see anybody the first morning after the shooting?

A. After John?

Q. Yes.

A. I saw John and Jim, I think.

Q. When John came the next morning, you made no attempt to tell him of this shooting?
A. I didn't get out of the cabin.
Q. You could have if you had wanted to?
A. No, sir.
Q. Why not?
A. He told me not to go out.
Q. Mrs. Strong was the only one on the outside?
A. Yes, sir; I think so. Bird may have went out; I'm not sure.
109 Q. Don't you know that he did?
A. He might have.
Q. Well, when Bird went out, what was to prevent you from going out, too?
A. He told me to stay in there.
Q. You minded him?
A. Of course.
Q. When did you next see anyone, after seeing John that next morning?
A. Why, we saw several parties come up the river.
Q. How long after?
A. Well, we seen John and them fellows on and off after that. They would probably come there, but outside of this party the only stranger that came was Black.
Q. Those men from the mine were down nearly every day?
A. No; John would come down once in a while.
Q. Anyone ever come with John?
A. No; he would usually come alone.
Q. Was there any of those times that anyone came with him?
A. Very seldom.
Q. Was there any time when they did?
A. I told you very seldom.
Q. Who came with him?
A. Jansen came once or twice.
Q. Shortly after the shooting was that?
A. A good while after.
Q. How long?
A. Quite a while after.
Q. How long is that?
A. Well, about two months, I guess.
Q. Did you make any attempt to tell them then of this tragedy?
110 A. I would try and tell John every time I got a chance, but I wouldn't often be give the chance.
Q. What was to prevent you from telling him?
A. Bird was there.
Q. Did you and Bird go to the post shortly after the shooting?
A. Yes, sir.
Q. How long after, was that?
A. Must have been a couple of weeks after.
Q. Who was at the post?
A. Black.
Q. Who else?
A. I don't remember.

Q. There was at least two or three men there?
A. Two men, maybe, and some Indians.
Q. When you went to the post, did you tell them this secret?
A. No, sir.
Q. Never mentioned it?
A. I was left in the boat; Bird went up and told me to remain in the boat there.
Q. You stated this morning that the reason you didn't tell anybody was that you distrusted all of them, Mrs. Strong and the rest?
A. Yes, sir.
Q. And Patterson and the miners?
A. I didn't trust them for the simple reason that I didn't know how they would take the situation, and what they would say, and Bird would often say that John had told him to do it, and all that sort of thing, and he said——
Q. Well, how long after the shooting occurred was it that Bird went up the river and was gone about a week?
A. That was in the spring of the year.
Q. Up to this time you hadn't trusted the woman either?
111 A. The time he went up the river?
Q. Why yes, and before that?
A. Not very much.
Q. Before the shooting occurred, did you hear the woman tell Bird in your presence that Hurlin and Patterson were plotting against him?
A. When?
Q. Before the shooting—the evening before, or a day or two?
A. They were wrangling about something, and quarreling with one another, and he says——
Q. (By the COURT.) Answer that question yes or no.
A. Yes.
Q. You heard her tell that?
A. Yes, sir; something to that effect.
Q. (By the COURT.) Now you may make any explanation that you may have to make.
A. Bird says to her, "Didn't you hear those fellows back of the bushes, there, plotting against me?" and she tried to turn it off, but finally she answered him that she had.
Q. (By Mr. MALONY.) Now, up to this time you say you hadn't trusted the woman or Patterson either?
A. No, sir.
Q. Explain why you didn't trust Patterson?
A. Once after the shooting occurred, in the cabin, why he says—they began talking about lodges, and Bird says to Patterson: "Why, you're a brother member of mine," Knights of Pythias, I believe he said, "I'm sorry to hear that," and they was always conversing with one another, and whenever we would get out somewhere I would ask him why
112 he and Bird didn't talk out loud and he never gave any reasonable answer, and I never quite trusted him after that.
Q. As a matter of fact, they both distrusted you?
A. I guess Bird did.
Q. Didn't you testify the last time that Patterson did, too?

A. Not that I remember of.

Q. Now, Mr. Bird, as I understand you, went up the river with a Swede, and was gone about a week?

A. Yes, sir.

Q. Who remained at the cabin during that week?

A. I did.

Q. Who was with you?

A. Mrs. Strong.

Q. Anybody else?

A. No, sir.

Q. You and Mrs. Strong remained there together did you?

A. Yes, sir.

Q. Was there any partition in the cabin—different rooms?

A. No, sir.

Q. How many bunks were there in the cabin?

A. Two.

Q. Were you making love to Mrs. Strong about that time?

A. No, sir; I'm not in the habit of making love to her.

Q. Did you then?

A. No, sir.

Q. You had some conversation about getting away with Mrs. Strong, you say—away from that place?

A. Yes, sir.

Q. And you had some conversation about getting away with Bird, too?

113 A. No, sir.

Q. Didn't you suggest to Mrs. Strong that you would chop Bird's hands off if you got a chance?

A. I told Mrs. Strong I would of done it if he had attempted to do any more shooting.

Q. Didn't you tell her that you would do it?

A. No, sir; I didn't.

Q. Didn't you tell Mrs. Strong that if Bird ever hit her, you would shoot him?

A. No, sir.

Q. Didn't you testify to that before in the other trial?

A. I testified to this: The day before the day that John and Black came up from the trading post, he was abusing Mrs. Strong and I told her if he hadn't stopped fighting with her I was going to shoot him.

Q. That is, fighting with Mrs. Bird?

A. No; Mrs. Strong—that if he had started to fight any more I wasn't going to take any more risks.

Q. Now, in answer to the question asked you at the last trial, I will ask you if you didn't testify as follows: "Ain't it a fact that you concluded to shoot Bird?"

"A. No, sir."

"Q. Didn't you testify anything to that effect?"

"A. I testified if he made any attempt to cause trouble, I would shoot him"—you testified to that, did you?

A. I did.

Q. Also did you testify to this effect: "The day before he had shoved the woman into the door, and was going to strike the woman, and if he had struck the woman I would shoot him?"

A. I testified something to that effect; yes, sir.

Q. And this all occurred after you and the woman had been alone together in that cabin for a week?

114 A. No, sir; I told her I would protect her from the minute we were going to the trading post and she told me that Bird was going to kill me.

Q. But this occurred the day after Bird got back?

A. The woman and I didn't speak of shooting Bird—we didn't talk that over together.

Q. Didn't you tell the woman that?

A. No, sir.

Q. Who did you tell that to?

A. I told it to you here, at the last trial.

Q. The woman had told you several things in the meantime, had she not, about Bird going to get away with you?

A. Yes.

Q. And this all occurred during this week you were together——

By the COURT. You have mentioned two different times, Mr. Malony; you should be specific so the witness will understand what statement you refer to. One time you referred to was when the men came back up the river to take Bird away, and another——

By Mr. MALONY. Now, when did Mrs. Strong first tell you that Bird was going to shoot you?

A. When Bird and John went up to the trading post.

Q. Bird never made any attempt to shoot you while you were there?

A. Not that I know of.

Q. If he had you would have known it?

A. I don't think he would have got the chance as long as I had a gun to defend myself.

Q. You told the jury this morning that you didn't have any gun?

A. I didn't for a while.

115 Q. Well, Bird could have shot you at any time before you got hold of a gun if he wanted to?

A. Yes, sir; I couldn't very well shoot him with my fingers.

Q. You also say Mr. Chapman, Mr. Black, and a number of men came up?

A. When?

Q. When they took Patterson down to the Mission.

A. I said Black, Chapman and Mr. Blaine.

Q. The three of them came up?

A. Yes, sir.

Q. Did you tell them at that time anything about the shooting?

A. Well, I told——

Q. Answer that question yes or no, sir.

A. No.

Q. When was the first time you ever told about the shooting?

A. I told John off and on long before, in the middle of the winter; didn't tell him right out, of course, but always hinted to him what had happened, but never got any satisfaction from him one way or the other.

Q. Always hinted, but never told him?
A. About as good as told him.
Q. When was the first time you told outright about it?
A. Who; John?
Q. Yes.
A. Why, I told John when he came back from the trading post.
Q. How long after?
A. Not very long.
Q. How long?
A. After him and Bird got back.
Q. After the shooting?
A. Considerable time.
Q. After you had seen Chapman and those men, was it?
116 A. No, sir; it was before.
Q. Now, then, you never paid Bird the five hundred dollars he put up for you, did you?
A. I don't know whether he ever put it up for me.
Q. Have you ever paid him for what he did put up for you?
A. No, sir.
Q. And you have never made any attempt to?
A. I never had a chance.
Q. If you couldn't hand it to him, couldn't you have sent it to him during all of this time you have had?
A. I think I done my service for him, when I stayed the winter out in that way.
Q. Then the amount of that five hundred dollars you think you don't owe Bird; is that the fact?
A. Yes, sir; I think that's pretty well paid.
(Objected to by counsel for the Government on the ground that the same is immaterial.
Objection sustained.)
Q. Now, after the last trial, you and Mrs. Strong went together, I believe?
A. No, sir.
Q. And you have been in Seattle together during all of this interval haven't you?
A. No, sir.
Q. Where were you and Mrs. Strong?
A. I don't know where she was.
Q. Don't you know that she was in Seattle all this time?
A. She was there, I think.
Q. You came back here with her last fall, didn't you?
A. On the same boat; yes, sir.
Q. You knew she was there in Seattle?
A. Yes, sir.
117 Q. And you know she was there afterwards—after you returned back from here?
A. No, sir; I don't know it.
Q. Do you swear you never saw her there?
A. I have seen her in Seattle several times.
Q. Isn't it a matter of fact that she was keeping you there?

A. No, sir; it is not.

(Objected to by counsel for the Government on the ground that it is immaterial, is an insult to the witness, and ask that the question be stricken out.

By the COURT. Yes, but that sort of a question doesn't hurt this witness, not a particle.)

Q. Now, I'll ask you this question, Mr. Sheffler: Didn't you testify at the last trial of this case as follows: "I overheard Bird ask the woman if Hurlin and Patterson were plotting against him, and she said yes, they were?"

A. No, sir; not that that you just read I didn't—not that I remember of.

(Objected to by counsel for the Government on the ground that the question was put to the witness as an impeaching question before, and he now repeats the same question.

By the COURT. Yes, and he has before explained just what was said and the circumstances under which it was said.)

By the WITNESS. I understood him to say that I overheard them say they were plotting.

Q. Now, I'll read the question and answer: "Give all the con-
118 versation you remember that we had on this occasion."

"A. I don't remember what was said; the only thing that I heard they were talking, and he said to the woman 'Didn't you tell me they were back in the bushes plotting against me?'"

"Q. What did she reply?

"A. She hesitated before she replied and then said, 'That's what they was.'"

By the COURT. Why are you asking that question, Mr. Maloney?

By Mr. MALONY. To show that this witness has made absolutely two different statements.

By the COURT. The witness has testified now exactly as it is given there; it seems to me you are simply consuming time.

By Mr. MALONY. You testified this morning, I believe, in a conversation that took place between Bird, Patterson, and Hurlin in your presence, that Bird stated to them they wouldn't leave until he got good and ready?

A. Bird told them that.

Q. Is that true?

A. Just state that again.

Q. You stated this morning that a conversation at which you were present, between Bird, Patterson, and Hurlin, Bird told them that they wouldn't leave until he got good and ready?

A. Yes, sir.

Q. Isn't it a fact that you testified on the last trial that he said to them he wouldn't divide the provisions until he got a good ready?

A. No, sir; if I did, it's a mistake. I didn't mean to testify to it that way.

119 Q. Didn't you testify as follows: "After we got through, Hurlin said we're ready to divide up, and Bird said you don't divide up at all until I get ready, or something to that effect; I don't know exactly what it was; and the next morning we went up to the cabin and then we went down to the boat, and they wanted me to ask him if

they could divide up, that they wanted to leave that day, and he said all right, he would come down——"

A. Yes; something to that effect.

Redirect examination by Gen. FREDERICHS:

You have stated, Mr. Sheffler, that your guns were always loaded; why were they always loaded?

A. They were Marlin magazine guns, and we usually shot geese or anything like that coming up the river, and we always had cartridges in the magazines so we could use them.

Q. You stated in your answer to counsel on cross-examination that whenever Bird said anything you readily assented or said yes—at least seemed to consent—why was that?

A. Because I had to. If I would disagree with him he was apt to do with me like he did the others.

Q. What was the motive then—fear, favor, or what was it?

A. I was afraid of him; I wasn't going to let him know what I thought; just agreed with him at the time.

Q. Now, as a matter of fact, counsel has examined you on that question, as to whether there was any conspiracy or combination between you people that you would do anything to Bird?

A. No, sir; there never was.

Q. Was there anything of that kind, so far as you know, ever contemplated or thought of by any of the party?

(Objected to by counsel as incompetent and immaterial.)

120 (Objection overruled. Exception.)

A. No, sir.

By Mr. MALONY: But you testified you would chop his hands off and shoot him.

By the COURT: Mr. Malony, all remarks of that kind at this time are highly improper. Even if this was your witness there are no circumstances under which you could use those methods of examination, unless by the favor or permission of the court.

By Gen. FREDERICHS: Now, then, I call your attention to this matter of plotting. Counsel has asked you about that. State if anything of that nature or character, so far as you know or had any knowledge of, ever occurred between you and these people?

A. No, sir; not that I know of.

Q. You have stated that the evening before this shooting you heard Bird, Hurlin, and Patterson in a conversation?

A. Yes, sir.

Q. I understand you to say you didn't get their words, simply heard enough to know they were talking about the division of the provisions?

A. Yes, sir.

Q. Did you understand enough to know whether there was any contention as to the proportion in which they were to be divided?

(Objected to by counsel for defendant, on the ground that the question is leading. Objection sustained.)

Q. Did you hear enough to inform you as to whether they were arguing or agreeing to a division of the property?

(Objected to as leading. Objection sustained.)

121 Q. State just what you did hear, Mr. Sheffler.

(Objected to as not redirect examination. Objection overruled. Exception.)

Q. State what you heard—you said you heard enough to tell they were talking about dividing.

A. I never heard very much there, but afterwards the same evening I heard one of them say, I think Hurlin said——

By the COURT: Was Mr. Bird present at the time?

A. Yes, sir; we were all there together—Bird was present.

Q. Then you may state what you heard.

A. Hurlin says "Hold on, if you will give us enough to live on during the winter we will be satisfied."

Q. What reply did Bird make to that?

A. I don't remember what reply he did make.

Q. Was that after you had heard them talking together when you wasn't present?

A. Yes, sir.

Q. You have stated that you were to take the scow and Bird was to take the launch—at whose suggestion was that?

A. At Bird's suggestion.

Q. Was there anything said to Bird as to where you intended to go?

A. No, sir; we told him we would probably go down the river a piece, but we didn't tell him where.

Q. You have stated in answer to counsel's question that Patterson advised Bird not to give himself up. Now you may state what, if any, reason he gave to Bird.

(Objected to——)

Q. ——Just wait till I ask my question—as to why he shouldn't give himself up?

(Objected to by counsel for the defendant as immaterial, incompetent, and improper.)

122 By the COURT. The conversation and declaration were brought out on cross-examination, and never had been testified to before. The objection is therefore overruled.

(Exception.)

A. Why, Patterson told him, he says, "You don't want to give yourself up," or something to that effect. I don't quite recall what he did say. Anyhow, he gave reasons that he didn't want to give himself up to those men up at the coal mine.

Q. That's Patterson's statement you are quoting from now?

A. Yes, sir; that's what I recall.

Q. Counsel has asked you when it was you first got friendly with Mrs. Strong, or, in other words, got confidence in her. I don't think you made that as plain as you might have made it. When did your confidence in her first obtain?

A. Well, when Bird and John went down to the trading post, she told me to be careful, that he was going to kill me—take me to the island and kill me.

Q. And your confidence in her dated from that time?

A. Yes, sir.

Q. Was that before or after Bird went off on this attempt to escape out of the country?

A. Before.
Q. You told her then, at that time, that you would stand by her and protect her?
A. Yes, sir.
Q. You say that during the time that Bird was absent you resided there in the cabin?
A. Yes, sir.
Q. With Mrs. Strong?
A. Yes, sir.
123 Q. Were your relations with her during that time any different than they had been before?
A. No, sir.
Q. She is a good deal older than you are, is she not?
A. Yes, sir.

Recross-examination by Mr. MALONY:

When John and Bird went down to the post, who was in the cabin?
A. Patterson.
Q. You and Patterson and Mrs. Bird?
A. Mrs. Strong.
Q. You stated that the reason you hadn't divulged those matters was that you were afraid of Bird?
A. Yes, sir.
Q. Bird is a man that don't weigh over a hundred and thirty or forty pounds, isn't he?
A. That didn't cut any figure with me.
Q. And you had a gun with you during this time?
A. Yes, sir.
Q. And yet you were terrorized by him?
A. I wasn't going to be trusting him, or anything like that.
Q. And there was plenty of men around there that you could have told it to?
A. Not just then.
Q. And the reason you concealed all of these things was your fear of Bird—is that right?
A. My fear of telling was because if I told there at the time, I didn't know what the woman or Bird would say, or Patterson. I made up my mind that I would either be murdered or get out some time and tell the truth.
124 Q. Yes; and when the woman got friendly you changed your mind?
A. O, I never trusted her.
Q. And were not her tool, either? Yes, I see.
(Counsel for the Government objects to those side remarks.
By the COURT. They are all improper and must not be repeated.)
Q. In your testimony this morning you testified about Bird trying to get across the Canadian line?
A. Yes, sir.
Q. Did you testify anything of that kind on the last hearing?
A. I don't remember; I think I testified he was trying to get to Dawson.

Q. Didn't you know that the Canadian line was a thousand miles away?

A. I didn't know it at that time.

Q. And yet he was trying to make that distance in the midst of a winter like that, and trying to get across the line?

A. I don't remember whether it was a thousand miles or not.

(Short recess taken.)

CHARLES SHEFFLER recalled for further redirect examination.

By Gen. FREDERICHS:

Mr. Sheffler, I find that I omitted to ask you a question. It was this: Bird—you stated that Bird and you made a trip down to fifteen miles below, and that you stayed outside when they went in. What did you go down there for? What was the object?

A. To get some carbolic acid and iodoform.

Q. For what purpose?

A. For Patterson's shoulder.

125 Q. Did you get it?

A. No, sir.

Q. Now, counsel asked you if Mrs. Strong didn't keep you down during the time that you have resided in Seattle—that is, since the last trial of this case? I want you to state to the court what you have been doing; what you did down there—your occupation?

A. When I first went there I worked in a printing office there. In January I made arrangements to go down the river for P. C. Richards, and also to come here and look after a libel suit they had.

Q. How much of that time was you in Seattle?

A. All that winter; and I came up here in May some time.

Q. During the time you were in Seattle, what did you do and where did you stay?

A. I lived on Thirteenth ave. and Olive street with a private family.

Q. Was Mrs. Strong living in the same place?

A. I never saw her at the time.

Q. You didn't see her in Seattle during that period of time?

A. No, sir.

Recross-examination by Mr. MALONEY:

Are you under bonds?

A. Am I now?

Q. Yes, sir.

A. No, sir; I'm under the marshal's care.

Q. You've been boarding at a hotel here all the time, haven't you?

By the COURT. You needn't answer that.

Q. When you were down to the trading post that time, you all went and took dinner with Black, didn't you?

126 A. Yes; we had something to eat, I believe.

Q. That trip did Bord cut the hairs of all those people there?

A. I believe he cut some people's hair.

Q. You had plenty of chances to tell about this occurrence if you wanted to then, didn't you?

A. I had the time to tell it; yes.

127 NAOMI STRONG, a witness duly called by the Government in said case, being first duly sworn, on her oath testified as follows:

By Mr. COBB. Before this witness is sworn, I desire on behalf of the defendant to make an objection to her being permitted to testify in this case, and as I do not think it proper to make the objection before the jury, I desire that the jury be withdrawn for that purpose.

By the COURT. Very well; the bailiffs may take the jury out for a walk (cautioning the jury, &c.).

By Mr. COBB (after the jury had retired). I now desire to have this witness sworn and to testify as to her qualifications as a witness.

By the COURT. What questions do you desire to ask her?

By Mr. COBB. I desire to ask her her name.

The COURT. That can be asked her at any time.

Mr. COBB. I would like her to answer that question under oath.

The COURT. What is the object of this proceeding, Mr. Cobb?

Mr. COBB. I want the witness sworn to answer questions now before the court—not to testify generally—so that I may base my questions upon it.

The COURT. Inform the court as to the nature of your inquiry, if you will.

Mr. COBB. I want to find out the name of this witness, and I base the objection on the fact that her true name has never been furnished in the list of witnesses in the case.

128 The COURT. Very well; let her be sworn.

(Witness sworn.)

By Mr. COBB:

What is your true name?

A. Strong.

Q. You have been married, have you?

A. Yes, sir; married and divorced, as I told you before.

Q. What was your husband's name?

A. I refuse to answer that.

(Objected to by counsel for the Government on the ground that it is immaterial. That was before the court before, and the court held that it wasn't necessary to bring in the names of parties not in any wise connected with the case. For reasons of her own she didn't then desire to bring in the name of her husband from whom she had been divorced; the court sustained her, and I ask that she be sustained now.)

By the COURT. The witness needn't answer as to the name of her divorced husband, if that is the question.

By Mr. COBB. Will the court permit us to ask as to whether her former husband's name is her true name?

The COURT. Yes, sir.

Q. Isn't your former husband's name your true name?

A. No, sir.

Q. It is not?

A. No, sir.

Q. On your former examination you stated that Strong was the name you had, did you not?

A. Strong is my maiden name; you can see that in the other case.

129 Q. That isn't your married name, is it?

A. I told you I was divorced; it is natural that I should take my maiden name then; isn't it?

By the COURT. Answer yes or no.

A. Well, say the question again.

Q. That isn't your married name?

A. No.

Q. Was your name changed by decree?

(Objected to as incompetent, irrelevant, and immaterial. The record is the best evidence, if it was material.)

By the COURT. What is you true name?

A. Naomi Strong.

Q. How long have you been known by that name?

A. Always; until I was married.

Q. Well, since your divorce?

A. I have always went by that name.

Q. How long since you have been divorced?

A. Until I met Mr. Bird, and then I went by the name of Bird.

Q. How long has it been since you were divorced from your former husband?

A. About ten years, or twelve.

Q. And since that time you have been known by the name of Naomi Strong?

A. Yes, sir.

Q. If I understand you, if you have gone by any other name since you have known your former husband it was only when you were living with him?

A. Yes, sir.

130 · Q. I think that is all.

A. I went by the name of Byers—excuse me, I didn't mention that.

By the COURT. Let the witness be sworn in the case.

By Mr. COBB. If the court will permit us to ask further questions.

By the COURT. Let them be brief.

Q. Didn't you also go by the name of Belle Pittman?

A. I never heard of that name until you people found it.

Q. Well, did you go by that name?

A. No, sir.

Q. Didn't you go by the name of May Belle Greene?

A. I never did.

Q. Did you also go by the name of May Belle Byers?

A. I went by the name of Byers.

Q. And by the name of Evans?

A. Yes, sir.

Q. And you now go by the name of Strong?

A. Yes, sir; that's my name.

(Counsel for the defendant object to the witness being sworn, on the ground that her true name has never been furnished on the list of witnesses given, only by the name of Strong.

And it appeared that on the list of witnesses served upon the defendant the said witness' name was Naomi Stroag.

But the court overruled said objection, held said witness to be competent,

and the name furnished to be sufficient; to which ruling of the court the defendant then and there excepted.

Witness sworn.

Whereupon the jury was returned into court.)

Direct examination by Gen. FREDERICHS:

What is your name?

A. Naomi Strong.

131 Q. Where did you reside, where was your home, Mrs. Strong?

A. Indiana.

Q. Where did you reside, if at all, after you left Indiana?

A. New Orleans.

Q. That was your last home, was it?

A. Yes sir; I made that my last home.

Q. What is your age?

A. Thirty-six.

Q. How long had you lived—when did you first come to New Orleans to live?

A. In 1892.

Q. When did you first become acquainted with this defendant, Homer Bird?

A. Ninety-four, I think, or ninety-three, I don't know which.

Q. Did your acquaintance with him continue up to the time you left New Orleans for the North?

A. Yes, sir.

Q. When did you leave New Orleans to come North?

A. In 1898.

Q. What time in the year of 1898?

A. The first of May.

Q. With whom did you leave New Orleans, if with anybody?

A. Mr. Bird and Mr. Patterson.

Q. Where did you go to from New Orleans?

A. First to San Francisco.

Q. How long did you remain in San Francisco?

A. We remained in San Francisco until the 21st of May.

Q. Then where did you go?

A. We went to St. Michaels, Alaska.

Q. What kind of a vessel did you take passage on to St. Michaels?

A. A sailing vessel—the "Rufus E. Wood."

132 Q. In what way did you travel with reference to your relations with Bird?

A. You mean as to staterooms?

Q. Yes; how did you travel?

A. Him and I and Patterson all had one stateroom together.

Q. Did you travel—in what relation did you travel with reference to Mr. Bird, this defendant?

A. I went as his wife.

Q. Under the name of Bird?

A. Under the name of Burdick.

Q. Mr. and Mrs. Burdick—is that how you traveled?

A. Yes, sir.

Q. At whose instance was that name assumed?

(Objected to by counsel for the defendant as immaterial.
Objection overruled.
Exception).

A. I don't remember, any more than Patterson, I think it was.

Q. Why did you travel under the name of Burdick instead of Bird?

(Objected to by counsel for defendant on the ground that the same is immaterial.
Objection sustained).

Q. You left there about what time?

A. Where?

Q. San Francisco.

A. The twenty-first of May, I think it was.

Q. When did you arrive at St Michaels?

A. On the Fourth of July.

Q. What did your party consist of—of whom did it consist?

A. Mr. Sheffler, Hurlin, Patterson, Bird, and myself.

Q. Where did Mr. Sheffler and Mr. Bird stay on the ship?

A. Hurlin, you mean?

133 Q. I mean Mr. Hurlin and Sheffler?

A. They took second-class passage.

Q. And when did you arrive at St. Michaels?

A. The Fourth of July.

Q. How long did you remain there?

A. About two weeks.

Q. Then what did you do?

A. Started up the river.

Q. How did you go up the river?

A. We had a barge and a launch.

Q. Steam launch?

A. Yes, sir.

Q. And the barge in tow of the launch was it?

A. Yes, sir.

Q. Did the party consist of the same persons you have already named on the trip up the Yukon?

A. Yes, sir.

Q. How long were you on the river going up?

A. We were on the river all the time until we stopped to build the cabin—from the 19th of July till about the 10th of September, when they commenced to build the cabin.

Q. So you arrived at the place you went into winter quarters on about the 10th day of September?

A. Yes, sir.

Q. What did you do, or—if you know how you came to stop at that place, tell the jury.

A. Well, they thought they could'nt get up the river, I guess.

Q. Why?

A. It was getting cold, and they concluded to stop and build a cabin for the winter.

Q. On which side of the Yukon River did you land?

134 A. On the north side.

Q. The left-hand side going up the river?

A. Yes, sir.

Q. Now then, Mrs. Strong, state to the jury what you did after tying up, stopping there—what was the next thing you did, if you know?

A. We stopped to build a cabin.

Q. They built a cabin—you mean they first got out the timber?

A. Yes; they got out the timbers and had the cabin almost finished when they had some words and couldn't agree, and they concluded—Mr. Sheffler and Patterson and Hurlin—to leave Mr. Bird and I there during the winter.

Q. How soon after you got there was it before any disagreement began, or they had words, as near as you can figure it?

A. How soon after we got there?

Q. Yes.

A. I don't remember.

Q. Was it a few days?

A. I don't remember.

Q. Now what was it that first attracted your attention or caused you to notice there was any disagreement?

A. Oh, they had words all along up the river.

Q. After they landed there, what is the first disagreement you can recall?

A. About Mr. Bird cursing Mr. Hurlin, I believe.

Q. State to the jury what he said.

(Objected to by counsel for the defendant unless the time, place, and circumstances are stated.)

Q. Well, you say it was at the place where you went into winter quarters?

A. Yes, sir.

135 Q. How many days, if you can recall?

A. I don't remember.

By the COURT. You may state approximately how long, if you don't remember accurately.

A. O, they was fussing all the time while they were building the cabin.

Q. (By the COURT.) Well, state this particular time as near as you can.

A. It was about three or four days before, I should say.

By Gen. FREDERICHS. You say it was three or four days after you landed there?

A. No, sir; before the shooting.

Q. Now, state just what occurred.

A. Mr. Bird called Mr. Hurlin an assumed name.

Q. Give his language, if you can?

A. He called him a son of a bitch.

Q. What was the occasion of that?

A. I don't remember any more what was the occasion of it.

Q. What did Mr. Hurlin say in response to that epithet?

A. He didn't say anything.

Q. Do you know what gave rise to Bird calling him that name—what Bird was angry at, if anything?

A. I don't remember.

Q. What was Bird's conduct generally toward Hurlin and Patterson and the rest from the time you landed at that place until the shooting occurred?

(Objected to by counsel for the defendant as immaterial.

By the COURT. It is not material, unless it assumed the character of quarrels of some kind.)

136 By Gen. FREDERICHS. Well, I'll withdraw that for the present. Was this the only time before the shooting and after you landed at that place, that you heard Bird curse Hurlin?

A. No; I had heard him cursing before that.

Q. Give the instances and what he said.

A. Why, just about the same.

Q. Did you hear him curse Hurlin more than once?

A. O, yes.

Q. Did you ever hear him curse Patterson and Sheffler?

(Objected to by counsel for the defendant on the ground that the same is leading.

Objection overruled. Exception.)

A. Yes.

Q. Give his language as near as you can recall it—what did you hear him say to them?

A. Well, son of a bitch, and curse them, and tell them that they were lazy, and all of that.

Q. Now, when did you first hear talk of this separation?

A. Well, I heard a couple of days before—after Bird called Hurlin a son of a bitch—then I heard them talking about they would separate and leave; that they couldn't stand Mr. Bird's abuse any longer.

Q. Heard who?

A. Mr. Patterson and Mr. Hurlin.

Q. Where were you when you heard them talking this over?

A. Down by the boat gathering moss, I believe. I don't just remember.

Q. Did you tell Bird what you had heard?

A. No; I told Patterson and Hurlin before Mr. Bird that I had heard them talking about that they would separate.

137 Q. At the time—when was it you told Bird you heard them talking about the separation, with reference to the time of the shooting?

A. The morning they were to leave; the morning of the shooting, I think.

Q. What brought up the subject, so that you told Bird this in their presence?

A. I told them when Hurlin was packing up his things to go; I told them I knew they were going away because I had heard them talking about it.

Q. Hurlin was packing up his things?

A. Yes, sir.

Q. Was that the morning before, or the morning of the shooting?

A. The morning of the shooting.

Q. Now, what response, if any, did Bird make to this, when you told him that you heard them say they were going?

A. Beg pardon?

Q. When you said to Mr. Hurlin in Bird's presence that you heard them talking about it the day before, what did Bird say, if anything?

A. I don't remember.

Q. Where were you when this conversation occurred?
A. In the boat?
Q. Was that—was it daylight then?
A. Yes, sir; it was daylight.
Q. Now, then, I want you to state, Mrs. Strong, all that occurred that morning; you slept in the boat, did you?
A. Yes, sir.
Q. Who got up first?
A. Mr. Patterson, I think.
Q. Who next?
A. I don't remember who got up next.
138 Q. You and Bird occupied a berth on the boat, did you?
A. Yes, sir; Mr. Patterson got up first and made the coffee that morning, and I don't remember who was the next to get up.
Q. They all got up before you—all of the men—and got away from the boat, did they?
A. Yes, sir; they always got up before I did.
Q. Did Bird get up before you did that morning?
A. Yes, sir; he got up.
Q. When they got up, where did they go, if you know?
A. Mr. Patterson and Sheffler and Hurlin went up to cut some timbers to roll the barge off the beach; the barge was on the beach—half of it—and Mr. Bird went up to work on the cabin—the cabin wasn't completed quite, and he went up to work on the cabin, I believe.
Q. What did you do?
A. I was preparing breakfast.
Q. How long was you preparing breakfast, from the time you got up until you called them to breakfast?
A. I don't remember the time; it was nine or ten o'clock; it took me about an hour or a half an hour till I got things prepared to call them to breakfast?
Q. You had had coffee earlier in the morning?
A. Yes, sir; we always had.
Q. What had you cooked for breakfast?
A. Oatmeal and some bacon, I believe?
Q. When you called them to breakfast, where were these men, Sheffler, Hurlin, and Patterson?
A. They were out working with these timbers.
Q. Were they within calling distance?
A. Yes; but Mr. Bird was up to the cabin.
Q. When you called them, what did they do?
139 A. Mr. Sheffler went up and called Mr. Bird first, I believe, to come down, they were ready to divide the provisions; and then while they were out talking, Mr. Bird took his own time to come down—and while they were out there talking, I called them to breakfast.
Q. When you called them, they immediately came on board?
A. I think Sheffler and Patterson came first—I don't remember; then Hurlin, and Bird was the last, I believe.
Q. When Bird came in, where did he seat himself?
A. On his bed, on the couch—the bunk.
Q. What did he do—what did you see him doing, if anything, on the couch?

A. He was sitting there figuring with a piece of paper.

Q. Did he have anything else there besides papers?

A. Not that I saw.

Q. He was figuring with a paper; now, when these three men came on board, where did they sit down, or stand up?

A. They sat down.

Q. Where?

A. Back in the stern of the boat; I sat down—Mr. Hurlin and Mr. Patterson and Mr. Sheffler sat down in a row, and I sat opposite of Mr. Hurlin.

Q. Will you look at that diagram, and say whether that, taking this here as the left side, next the shore, whether that looks anything like that boat?

A. Looks something like it, yes, sir; there's where Mr. Bird was sitting—there.

Q. That represents his bunk, does it?

A. Yes, sir; and right across here was Patterson's, and right across here was mine. Here was Sheffler's, and Mr. Hurlin's, and here is a trunk.

140 By Mr. MALONY. Will you designate that some way, so the reporter can get it in the record?

Q. Just put a cross here where the trunk was?

A. Yes, sir—[marking]; right there.

Q. Now, where these men—take your seat, Mrs. Strong—where did these men sit?

A. Mr. Hurlin sat right there [showing on map]—right here, and Sheffler here, Patterson here, and I sat right over here was the stove.

Q. What were they sitting on?

A. A box of provisions and things.

Q. Sitting together?

A. Yes, sir; sitting close together.

Q. Where was Bird at this time, after they took their seats?

A. He was on his bunk with a piece of paper, figuring.

Q. Now, where, if you know, was his gun at the time he was there figuring?

A. I don't know where it was.

Q. Do you know where he was in the habit of keeping it?

A. Up over the bed.

Q. Over his bunk there?

A. Yes, sir.

Q. That is, the bunk you and him slept in?

A. Yes, sir.

Q. Now, when these men took their seats, as I understand it, they were in the order, Patterson on the right, Sheffler in the center, and Hurlin on the left.

A. Yes, sir.

Q. Did you serve them with any food?

A. Yes, sir; I gave them breakfast.

Q. What did you give them?

A. Oat meal first.

Q. In what kind of a vessel?

141 A. In a tin plate.

Q. They had oatmeal in the tin plate, did they?

A. Yes, sir.

Q. You say you say opposite these men?

A. Yes, sir. Sheffler and I were talking about a trap I had set to catch some grouse, and——

Q. Now, what was——

A. ——we were talking about it, and all at once I heard Mr. Bird's gun click—shotgun—when he broke it it clicked, of course, and I looked up and he had the gun to his shoulder, and in the meantime Mr. Sheffler looked around; I think he fired at Mr. Hurlin, and then Sheffler looked around and held up his hands and told him for God's sake not to shoot him, and I jumped up after he fired at Hurlin, and Mr. Patterson kind of jumped back of me—jumped behind me like, and I asked Bird not to shoot; he had the gun to his shoulder all the time, and I jumped and run; put my hand over Patterson's shoulder and run through the boat, and just as I passed him in the boat he fired at Mr. Patterson, and Patterson jumped overboard; whether the shot struck him when he jumped overboard I don't know, and in the meantime I jumps out on the beach, and Mr. Patterson jumps overboard, and Mr. Bird comes running out, climbs over the bow of the boat with two guns in his hand—his own and Mr. Sheffler's—and heads Patterson off; the boat was in the water just kind of half on the beach and half in the water, and so Mr. Patterson wades around on the side of the boat to get out, and Bird heads him off and tells him not to come near him, and Patterson kept begging him not to shoot him, and Bird up with his gun again and says, "Bob, you dirty son of a bitch, you're the cause of this," and shot at him the second time, and Patterson came to the beach [witness breaks down and sobs]——

142 Q. Well, compose yourself, Mrs. Strong, if you can, and go on and state what occurred there. What happened when Mr. Patterson got to the beach?

A. They were all on the beach then, and he begged Bird not to shoot him.

Q. What did he say to him?

A. He held out his hands and told him for God's sake to think of his poor family.

Q. What did Bird say?

A. I don't remember any more what he did say; I think he says, "Bob, I have thought of our families," or something like that.

Q. At the time he fired at Hurlin, did you see what Mr. Hurlin did? Immediately after, as far as Hurlin was concerned? Immediately after the shooting of Hurlin, what followed [witness sobs]; what did he do, Mrs. Strong?

A. Mr. Hurlin?

Q. Yes.

A. He never moved at all; he sat in the same position when he was shot.

Q. Did his body change position at all?

A. No; just remained that way for quite a while.

Q. Did you see any evidence of a wound on Mr. Hurlin, anything——

A. I saw where there was a hole in his head right here, the left side.

Q. What position was his head in?

A. Leaning over this way, with his hand like this, and his plate in his lap.

Q. Did you see anything in the plate?

A. Blood and brains [witness sobs].

Q. Now, after Bird went ashore and Mr. Patterson held his hand up and begged him not shoot, then what happened?

A. They took him to the cabin.

143 Q. Who took him up to the cabin?

A. Bird and Sheffler.

Q. What did you do?

A. I carried the guns.

Q. Why did you carry the guns?

A. Bird told me to carry them.

Q. What did he tell you?

A. He told me to stay a certain distance behind so Sheffler wouldn't grab the guns.

A. Did you obey him?

A. Yes, sir.

Q. You also went up to the cabin, did you?

A. Yes, sir.

Q. What did you do with Patterson?

A. They made him a bed.

Q. Then what was the next thing, Mrs. Strong? Did you help to dress his wounds, or do anything further with him?

A. Mr. Sheffler and Mr. Bird made him a bed and fixed him as comfortable as they could, and Mr. Bird then went to the boat.

Q. Did you remain at the cabin?

A. I remained a little while and Bird called me, I believe; but I was back and forth several times to the cabin and the boat to get some medicine for Mr. Patterson.

Q. Where was Patterson wounded?

A. In the left shoulder—right on the left shoulder here, and the shots came out here, some of them on top of the shoulder, and went through here and knocked his teeth out here, and a shot came out here on the right side of his eye—there was a hole there.

Q. What had been done with the guns in the meantime?

A. I believe Mr. Bird took them back to the boat.

Q. When he went away and left the cabin?

A. Yes, sir.

144 Q. You say he called you after you got—that is, after he got down to the boat?

A. Yes, sir; he called me.

Q. Did you go?

A. Yes, sir.

Q. What happened when you got down there?

A. Bird wanted to know what to do with Hurlin, and I told him I didn't know. He said he thought he would throw him out in the middle of the river—thought he would row out in the middle of the river and throw him overboard, and I told him no, not to do that, but to bury him.

Q. Was Hurlin still there where you left him?

A. No; while Mr. Bird was digging or doing something, Hurlin fell off the box (sobbing), and I asked Mr. Bird what that was, and he said Hurlin fell off the box.

Q. Did he dig a hole?

A. Yes, sir.

Q. And then what did he do?

A. He wanted to know who he could get to help him bury him, and said he thought he would get Sheffler—then he said no, he was afraid Sheffler would tell where he was buried, and he asked me to help him and I told him I couldn't. He says, "Yes, you can," and I got into the boat to help him (sobbing), and I saw Mr. Hurlin—after he fell over his face was turned up, and I started to run out of the boat, and Bird threw the sleeping bag over his face so I wouldn't see it again, and would have courage to help him, and I took hold of Hurlin's feet and helped him anyhow.

Q. At whose instance did you take hold of his feet and help?

A. Bird's.

Q. And you got him out on shore?

A. I helped with him out of the boat, and when we was taking him out of the boat Bird fell down, and Hurlin fell on top of
145 him, and then Bird drug him and put him in the hole.

Q. Did he put the sleeping bag over him?

A. Yes, sir.

Q. Anything else besides that?

A. No.

Q. How deep was that hole?

A. Wasn't very deep.

Q. How near the water line was it?

A. I should judge about fifteen feet, possibly more; I don't know.

Q. Now, he threw him into this hole——

(Counsel for the defendant objects to this manner of questioning. He has been harping on that over and over just for to prejudice the jury, no other excuse whatever. He tried that before, too.)

By the COURT. You may state how the body was disposed of, whether it was buried or otherwise.

A. Well, it was put in that hole, and Bird threw dirt over it; I think he put a blanket or something over him.

Q. Over the sleeping bag?

A. No; he put him in the sleeping bag, and then a blanket—I don't exactly remember whether he put a blanket over him or not.

Q. And covered it over with dirt?

A. Yes, sir.

Q. That was—do you remember the date of that—the day of the month?

A. The 27th of September.

Q. In the year 1898?

A. Yes, sir.

Q. How old a man was Hurlin, as near as you can tell, as near as you recollect it?

A. I think he was twenty-four or twenty-five; I don't exactly remember his age.

Q. What sized man was he?

A. He was about my size, I guess.

146 Q. Small man, was he?

A. Yes, sir.

Q. What was he with reference to being a quarrelsome man, or otherwise?

A. He had a very good disposition; very peaceful.

Q. Now, after this, Mrs. Strong, after he buried this body, what did he do?

A. He went up to the cabin.

Q. Did you also go up to the cabin, immediately?

A. Yes, sir.

Q. Now, how long was it after this occurrence before you saw any person—any stranger come about there?

A. Mr. Thompkins came up the next day or the same day; the next day, I believe. Mr. John Thompkins, the man that kept the coal mine, him and Mr. Jansen came to borrow the steam launch to go up to Nulato, I think.

Q. Now, did you say anything to these men about what had happened the day before?

A. No; I didn't. I was standing outside and went in and told Mr. Bird and Patterson there was—that Mr. Thompkins was coming and they told me to tell them they were not in; Mr. Patterson said he didn't care to be bothered with anybody; told me to tell them they wasn't at home; that they had gone out prospecting, and I told Mr. Thompkins when he came. He came up, and they were in the cabin with Patterson. Mr. Sheffler was dressing his wounds—him and Bird—and the next day after the shooting this was.

Q. Did Sheffler go out when they were there?

A. Not while they was there.

Q. When was the next—how soon after that was anybody—well, they went away, did they?

A. Yes, sir.

147 Q. Where did they go, if you know?

A. They went back home, I suppose.

Q. How soon after that did any stranger appear on the scene again?

A. Well, I don't remember. I think it was Mr. Black, and Redfield, and those parties came down one Sunday.

Q. State whether or not any inquiries were made by any person as to where Hurlin was.

(Objected to by counsel for the defendant, on the ground that the same is immaterial.

Objection sustained.)

Q. State whether or not you told any person what had occurred there within the next few weeks, or within the next few months, Mrs. Strong.

A. I never told anyone about it.

Q. Why?

A. Because I was afraid to.

Q. Afraid of what—of whom?

A. Afraid of Mr. Bird. I wasn't going to trust anybody after that.

Q. State what, if any, instructions or directions you had received from Bird with reference to telling or saying anything about it.

A. Of course we told him we wouldn't tell anything about it.
Q. How came you to tell him that?
(Objected to as immaterial.
By the COURT. Include in your question the circumstances under which the promise was made.)
Q. How did you come to tell Bird that you wouldn't say anything about it?
A. I don't remember.
Q. Was anything said by Bird to you or Sheffler in your presence about——
148 (Counsel for the defendant object to the *the* question as leading.)
A. When I was down to the boat?
(The objection is overruled. Exception.)
Q. Yes.
A. When I was down to the boat Bird said to me, "You will probably get mad at me and tell on me some day," and I says, "No, I won't; I'll never tell on you."
Q. Did he say anything further about you or Sheffler telling this on him?
A. He spoke of it several times. He said if he thought Sheffler was liable to tell on him he would kill him too.
Q. Did he later on say anything further about Sheffler, as to what he would do, at all?
A. Said that if he thought he would tell he would kill him.
Q. State, Mrs. Strong, if you ever made any communication to Sheffler with reference to any threats Bird had made.
A. I did tell Mr. Sheffler one day. Bird and Thompkins went to Black's trading post about fifteen miles from there, and I told Mr. Bird intended, if he thought he would tell on him, he intended to kill him.
Q. Did you tell him what Bird said?
A. Yes; if Bird thought he would tell on him he would kill him.
Q. Did you tell him as to how he proposed to do it?
A. Not that I remember of now.
Q. What did they go down to this place for, Bird and Sheffler?
A. Mr. Bird and Thompkins, you mean, down to the trading post?
Q. Yes.
A. They went down there to get some goods for Thompkins—some food.
Q. And it was during that trip that you told Mr. Sheffler?
A. Yes, sir.
Q. Did you caution Mr. Sheffler, or warn him?
(Objected to by counsel for defendant as leading. Objection sustained.)
A. I don't remember.
149 By the COURT. You needn't answer that.
Q. When did Bird next leave the cabin, if at all?
A. After they took Mr. Patterson away, down to Anvik—Rev. Chapman came and got him, and Mr. Bird went up the river.
Q. Why did he go up the river; did he give any reason?
A. Yes; he gave as a reason that he was afraid they would come down and mob him.

Q. Afraid who would?

A. Afraid Patters'n would tell on him down to Anvik, and that they would come and arrest him and mob him.

Q. Where did he say he would try to go?

A. That he would try to make his way out—go up to Dawson, and make his way out to the States.

Q. How long was he gone?

A. A week.

Q. Then he returned. Did he give any reason why he came back?

A. He said that he couldn't get any further—couldn't stand the trip.

Q. Previous to this time—or was it before or after this that he and Shaffler went to the trading post?

A. Before that.

Q. What did they go for?

A. For medicine for Patterson's wounds.

Q. What kind of medicine?

A. I don't know what kind of medicine they were going to get.

Q. Now, was you present at the time Bird was put under arrest?

A. No; I went outside—Mr. Black told me to go outside, and I went out and stayed.

Q. Could you hear what was said inside?

A. No, sir.

Q. What was the treatment by Mr. Bird of yourself and Sheffler after he came back from this trip?

By the COURT. I don't think that's relevant.

150 Cross-examination by Mr. MALONY:

What did I understand you to say your name was?

A. Strong.

Q. Strong, from New Orleans? You say you are from New Orleans?

A. My home—yes; I was in New Orleans, and made that my home for the last couple of years.

Q. Did you go under the name of Byers there?

A. Yes, sir.

Q. Why did you go under the name of Byers?

A. Because I kept house for Mr. Byers.

(Counsel for the Government objects to this line of testimony as incompetent, irrelevant, and improper cross-examination.

Objection sustained. Exception.)

Q. I'll ask you if you went under the name of Evans?

A. Yes.

(Objected to as incompetent, irrelevant, and immaterial.

Objection overruled.)

Q. You went by the name of Evans in New Orleans?

A. Yes, sir.

Q. And you answered that you had also went under the name of Byers there?

A. Yes, sir.

Q. You lived with both of these men?

A. I kept house for Mr. Byers—was his housekeeper.

(Objected to by counsel for the Government on the ground that these

further questions are irrelevant, incompetent, and immaterial, and not proper cross-examination.

By the COURT. That objection has been sustained.)

151 By Mr. COBB. Does the court hold that we can't show the character of this witness?

By the COURT. Not that way, on cross-examination.

By Mr. MALONY. You state that you left the State of Indiana to go to New Orleans?

A. Yes, sir.

(Fourth exception.)

Q. Isn't it a matter of fact that you left the State of Indiana because you were charged with theft?

By the COURT. That is not cross-examination. Don't let that be pursued any further.

(To which ruling defendant then and there excepted. Exception.)

Q. You went with Bird, as I understood you to say, from New Orleans to San Francisco?

A. Yes, sir.

Q. And you went with him as his mistress. Is that right?

A. Do I have to answer that?

By the COURT. Answer the question.

Yes, sir.

Q. Now, who composed that party?

A. Mr. Bird, Mr. Sheffler, Mr. Patterson, Mr. Hurlin, and myself.

Q. Mr. Bird put up for your expenses, I presume; did he?

A. Yes, sir.

Q. Did you ever have any interest in the outfit they were fitting up—ever advance any money?

A. No, sir.

Q. Did you ever tell Sheffler you did?

A. I told him, Mr. Black—Mr. Bird told me to tell that at Mr. Blacks, that I had three hundred dollars interest in it, but I didn't.

Q. Then you really had none?

A. No.

152 Q. When did you first meet this Mr. Sheffler?

A. Just before him and Hurlin came to San Francisco Bird and I went down to his house.

Q. That was the first time you met him?

A. Yes, sir.

Q. When did you first meet Patterson?

A. On the train, after leaving New Orleans for San Francisco.

Q. And Hurlin?

A. I met him at San Francisco.

Q. Did you all sail together from San Francisco to St. Michaels?

A. Yes, sir.

Q. On the way up do you remember any settlement they had on board the boat about the provisions they had purchased?

A. On the sailboat, going over?

Q. Yes.

A. No, sir; I never knew anything about it.

Q. And you all started up the river after you got to St. Michaels?
A. Yes, sir.
Q. And arrived at the place where you made your winter quarters?
A. Yes, sir.
Q. Did Mr. Bird desire to stop at the place where you did stop?
A. No, he didn't care to stop; he wanted to go up farther.
Q. But the others did want to stop, did they?
A. Yes, sir.
Q. And they did stop?
A. Yes, sir.
Q. Now, you stated you heard three or four days before the shooting a conversation that took place between Hurlin and Patterson about leaving, did you?
A. Yes, I believe I did; I don't remember, Mr. Malony.
Q. Didn't you testify to that a few minutes ago?
153 A. I don't remember just how many days it was, as I said before.
Q. Well, about how many days?
A. About three or four, I guess.
Q. That conversation—what was it that you heard at the time?
A. They were talking about separating; they couldn't get along with Mr. Bird any longer.
Q. What was it you said they were talking about?
A. About separating.
Q. Now, what was said?
A. Why, I just heard them say they were going to separate; they couldn't get along with Bird.
Q. That was all you heard them say, was it?
A. Yes, sir.
Q. Did you repeat that conversation to Mr. Bird?
A. I don't remember whether I did or not.
Q. Don't you know that you did?
A. I don't remember, I said.
Q. Don't you remember telling Bird that they were plotting against him at that time?
A. I don't remember that; I didn't use the word plotting, because I never heard anything like that going on—how could I tell it?
Q. Don't you know? Did you not, in the presence of Patterson, Hurlin, and Sheffler, when asked by Mr. Bird if you did not say they were plotting against him or did not hear them plotting against him, admit that you did say it?
A. I say this: I didn't tell Mr. Bird they were plotting against him, nor nothing of the kind. How could I when I never heard them plotting? I said I heard them talking about separating—that's what I said.
Q. Now, you answer my question—read that question, Mr. Reporter. [Reporter repeats question.] Now, will you answer that, please?
A. Well, I didn't tell him they were plotting against him.
154 Q. Well, answer it that way then—that's your answer, is it?
A. No, I didn't.
Q. Then, if Sheffler says you did, he is telling what isn't true?
By the COURT. You need not answer that question.
(Exception.)

Q. This conversation took place two or three days before the shooting?
A. I said about that—I'm not positive.
Q. Anything take place just the evening before the shooting?
A. Not that I remember now.
Q. Did you ever overhear any conversation between Patterson and Hurlin about dividing up at that time—that's the evening before the shooting—about dividing up the provisions?
A. I don't remember that I did.
Q. Did you ever hear any conversation about them dividing up the provisions at all?
A. Only the morning of the shooting, I heard them talking about it.
Q. At the time you heard the conversation about the dividing of the provisions, did you hear Bird insisting on having the miners come down and settle it?
A. Yes, I heard him say something like, "Let them get John Thompkins to come up and divide them."
Q. Now, what did they say in reply to that?
A. Well, Hurlin spoke up and said, "Well, Bird, we won't beat you; let's divide this to suit ourselves"—something like that—that they didn't want to beat him. He said it took more for three people to live on than for two.
Q. Hurlin said that?
A. Yes, sir.
Q. Was Mr. Patterson present?
A. Yes, sir.
Q. Was Sheffler there, too?
155 A. I don't remember whether he was there or not now.
Q. What did—what time did that take place that morning?
A. This was before breakfast, while they were drinking their black coffee.
Q. Sheffler was there at the time?
A. Well, I don't know; I think he was. I don't know whether he was or not, but Hurlin, Patterson, and Bird was there.
Q. After they had their black coffee, where did the men go then?
A. Well, Mr. Patterson, Hurlin, and Sheffler went to cut those logs to get the boat off the beach with, and Mr. Bird went up to the cabin.
Q. Did you go up to the cabin that morning?
A. No; not that morning, I don't think.
Q. Were you up to the cabin the evening before?
A. Yes, I was up to the cabin the evening before.
Q. Mr. Bird was up there?
A. Yes, sir; he was up there fixing the cabin.
Q. And the other men down in the boat?
A. Yes, sir.
Q. Did you tell Mr. Bird when you came up there, the evening before the shooting, to let them go; they were down there loading their guns preparing for trouble?
A. No; I didn't.
Q. Did you tell him anything of that kind?
A. No, sir; because I couldn't. I didn't know anything of that kind. How could I tell them?

Q. What did you tell him?

(By the COURT. That isn't cross-examination. You're now asking direct questions about something that has never been testified to in the case. That is the trouble with your question; that matter has never been hinted at even, by this witness. If you are laying the foundation for impeachment, that is another thing, and you should put the question in a proper way.

Exception.)

Q. Now, you state you were up there that evening?

A. Yes, sir; helping fix the tent; the cabin.

Q. You went up there for that purpose, did you?

A. Yes; he told me after supper to come up and help him fix the cabin.

Q. And you deny telling him that they were getting their guns ready for trouble?

A. Yes; I do. I never told him that.

Q. Now, this morning, Mrs. Strong—will you come down here and look at this map—now, do you know what was the length of this boat?

A. I couldn't tell you; I don't have any idea.

Q. Well, about its length?

A. I couldn't tell you, Mr. Malony.

Q. Was it wider at the center than it was at the stern or the bow?

A. I think it was; came out more like this.

Q. And narrowed down as it got to the stern; about what was the width of the boat, if you know?

A. I couldn't tell you, I'm sure; never measured it.

Q. Well, about the width?

A. I wouldn't say, because I would be wrong. I'm no judge of those things.

Q. Well, this represents the center here; at the stern of the boat—now, you have seen this map before; had it explained to you?

A. Yes, sir.

157 Q. About what was the width of that seat at the stern there?

A. Why, I couldn't tell you that either.

Q. Was it two feet in width?

A. I wouldn't be positive, because if I should say I wouldn't be right.

Q. Can you measure about how wide—on the table there?

A. About that wide [illustrating with her hands].

Q. From there to there?

A. Yes, sir.

Q. What does this represent here?

A. That's the stove.

Q. About how wide was the stove?

A. About two feet I guess; it was a small stove.

Q. What was the distance, or about the distance, between the seat there and the seat on which the men sat that morning?

A. I should judge a couple of feet; I'm not positive.

Q. Was the distance such that when you were sitting on this seat here, and the men over here, that your knees touched?

A. Yes; it was very crowded.

Q. That is, when you were sitting down your knees would touch—you were sitting opposite?

A. Yes, sir.
Q. This here represents a barrel?
A. Yes, sir; of water.
Q. State about what sized barrel that was, Mrs. Strong.
A. It was a good-sized barrel; I couldn't tell you.
Q. Did it fill up the space pretty well between the end of the seat and this here?
A. Almost; there was a little space there.
Q. So this wouldn't be an accurate drawing at all, in that it would represent this as too small a space right in here?
A. Well, it wasn't such a very large space.
158 Q. Well, it filled up pretty well over here then. Where did you sit that morning?
A. Right here.
Q. That is, if the barrel came over this way, you sat between the barrel and the edge of this stove?
A. Yes, sir; right between.
Q. Did the stove come out the full width of that back seat?
A. Not quite; almost, though.
Q. What was this here, marked "grub box."
A. That's the box for dishes and provisions and things.
Q. That was on the seat, here—I mean, sat down on that board across there?
A. Yes, sir; it was there on the side.
Q. How high was that above the seat?
A. Why, it was about that high [indicating].
Q. It was one of those ordinary cracker boxes, was it?
A. Why, I don't remember what it was.
Q. Now, then, where did the men set?
A. Mr. Hurlin sat here, Mr. Sheffler here, and Mr. Patterson here.
Q. Of whom did you sit opposite?
A. Mr. Hurlin.
Q. Did you sit directly opposite Mr. Hurlin?
A. I did.
Q. Mr. Sheffler sat in the middle, did he?
A. Yes, sir.
Q. And Mr. Patterson here?
A. Yes, sir.
Q. What about was the width of the boat here at this point where the men were sitting, and where this cracker box was?
A. I wouldn't have any idea.
Q. Did the cracker box occupy half of that space there, or more?
159 A. It didn't quite occupy half, I don't believe—I don't remember.
Q. Very close to half?
A. Yes; I think so; I don't know.
Q. And the three men set in there?
A. Yes, sir. No; Hurlin sat in here; Hurlin didn't sit right square on the seat—he sat right here on the corner.
Q. What does this represent here?
A. That's Mr. Bird's and my bed.

Q. That's where Mr. Bird and you slept?
A. Yes, sir.
Q. What was that bunk made of?
A. Sleeping bags, and provisions, and so forth.
Q. Sleeping bags laid right down on the provisions—that right?
A. Yes, sir.
Q. What does this bunk right here represent?
A. That's where Mr. Patterson slept.
Q. And where did Sheffler sleep?
A. Him and Hurlin slept along in here.
Q. What, if anything, was usually kept in the back of the boat here besides this water barrel and a stove?
A. I don't remember of anything.
Q. Wasn't it customary for Mr. Bird to have his shotgun back here?
A. No; he never kept his gun back there.
Q. Who did the shooting coming up the river?
A. Ducks and things?
Q. Yes?
A. Mr. Bird.
Q. Who did the steering?
A. Mr. Patterson did.
Q. Mr. Bird did the steering, didn't he?
160 A. Not much; sometimes he would help with the launch—Mr. Patterson and myself usually did it.
Q. Who did the shooting when you were anchored there—stationed there?
A. Mr. Bird.
Q. The ducks and geese as they usually flew up and down the river, didn't he?
A. Yes, sir.
Q. Isn't it a matter of fact that Bird kept his shotgun right there [indicating on map]?
A. No, sir; he kept it in——
Q. Wasn't this inclosed by a canvas from bunk number one here up to here?
A. Over here in the back you could leave it closed; didn't always open it, only in a few places.
Q. All open, was it?
A. All closed, I said, except a few places.
Q. Now the morning of the shooting, and when the three men were sitting there, where was Bird?
A. Bird was standing right here [indicating].
Q. Standing on his bunk?
A. No; standing right in this aisle here, when he did the shooting.
Q. What was in the aisle, the groceries and provisions, or just the bottom of the boat?
A. No provisions there.
Q. It was filled up to a level there wasn't—level across?
A. No, sir; not quite.
Q. Well, how was it, sunk down or straight across, or higher?
A. [Indicating.] This was sunk down more.

Q. Sunk down, was it?

A. Well, it was hollow along there.

161 Q. Could a man stand up straight in there?

A. Yes, he could; for that was topped up like—like this [indicating].

Q. When Mr. Bird did the shooting was he standing straight?

A. He was standing up.

Q. Now designate on the chart or diagram about where, with reference to this bunk of his, he was standing?

A. About here—about the middle of the bunk.

Q. And about how far from this seat—how many feet?

A. Wasn't very far—I couldn't tell.

Q. Well, how many feet would you say?

A. I haven't any idea.

Q. About how long was this bunk of yours?

A. Why, I don't know how long it was.

Q. Over six feet and a half.

A. About seven feet, I should guess.

Q. And he was standing about the middle of the bunk?

A. Yes, sir.

Q. So that would leave him about three feet and a half from where the men were sitting?

A. I guess so.

Q. Well, what would you say?

A. I'm no judge of that; I never measured.

Q. Is that all the information you can afford us—that he was standing about the middle of the bunk, which was about seven feet in length?

A. That is all I know.

Q. Did I understand you to say that when Bird fired a shot he was standing up and had the gun to his shoulder?

A. Yes.

Q. Were these shots fired rapidly—one, two—one after the other?

A. He shot Mr. Hurlin first and Patterson jumped behind me

162 and after I run out he fired at Patterson.

Q. What was Patterson doing when Bird shot him?

A. I didn't see him, because, as I tell you, I ran out of the boat—I didn't see whether he jumped overboard or not, or whether he shot him before he jumped.

Q. Did Bird shoot Patterson as he arose from his seat there?

A. He never shot Patterson until I passed him in the boat.

Q. Now, then, look here just a moment more—let's get this thing straight. At the time of the shooting you were sitting here, were you not, in the back of the boat?

A. Yes, sir.

Q. Patterson was sitting here next to the grub box?

A. No; Hurlin and Sheffler here, and Patterson there [indicating].

Q. Now, then, where was Patterson when Bird fired at him?

A. I jumped up when he shot Hurlin—I was standing there—Patterson got hold of me like, or back of me, and I turned and ran past him, and after I got through he fired at Patterson.

Q. Patterson was back of you when he caught hold of you—I understood you to say he took hold of you or you of him?

A. Yes, sir; he got hold of me like.

Q. About what part of the boat were you when he let go at Patterson?

A. I just got past Bird.

Q. When Patterson came back and got behind you, which way was he facing?

A. He was facing Bird, when Patterson got hold me that way.

Q. He got behind you, and then did he jump overboard?

A. I don't know whether he run and got overboard.

Q. Show just how Patterson got ahold of you, Mrs. Strong?

A. He got hold of me like this—held on like this [illustrating].

Q. You were in front of him, and he right behind you—you were here, for instance, and he here?

A. Yes, sir.

163 Q. Now, then, when you ran and came up here, say [illustrating on diagram]—Patterson was facing Bird, you say?

A. Yes; but I don't know whether he run and jumped overboard when Bird shot him.

Q. So you will swear, as Patterson arose from this seat, and before he run behind you, that Bird didn't shoot him—is that right?

A. Well, he never fired the second shot until after I passed him in the boat.

Q. Now, you will swear positively, Mrs. Strong, that he didn't?

(Counsel for the Government object to the question as repetition.

By Mr. MALONY. If the court please, I want to get this thing clear. Sheffler swears that he shot Patterson when he arose. I want to know if that is correct.

By the COURT. I think it is clear, as far as the testimony of this witness is concerned.)

Q. Now, where was Mr. Patterson wounded?

A. In the left shoulder, right about there [illustrating].

Q. About there [illustrating]?

A. Yes, sir.

Q. Where did the shot come out, do you say?

A. Right here [illustrating].

Q. Now, when the men came down—when Mr. Bird came down in the morning from the cabin—you say Sheffler called him down. Now, as I understand it, you and Mr. Hurlin sat in a direct line, directly in front of Bird?

A. Yes, sir.

Q. Bird was immediately behind and in line with Hurlin?

A. Yes, sir.

Q. Now, when Bird came down from the cabin in the morning, after Sheffler called him to come down, what, if anything, was said

164 by you?

A. When they came down?

Q. Yes. What did you say?

A. I don't remember of saying anything.

Q. You called them to breakfast, didn't you?

A. Yes.

Q. Did they come immediately?

A. I don't remember any more; it's been so long; I can't remember every little incident, Mr. Malony.

Q. Well, they came on board and sat down to breakfast, didn't they?
A. Yes, sir
Q. What was Bird doing at the time?
A. Sitting on his bunk figuring with some papers.
Q. Where did he get the papers—do you remember?
A. I don't know.
Q. How long had he been sitting there before these men started to eat their breakfast?
A. Well, he came in after the other men had came in.
Q. After they did?
A. Yes, sir.
Q. Did any conversation take place in your presence at that time between them?
A. While we were eating breakfast?
Q. Yes; while you were eating and he was looking at those papers.
A. No; not at that instant; only Mr. Sheffler and I were talking about the grouse, as I said.
Q. Was there at any other instant?
A. Before that?
Q. Yes.
A. Yes; they were speaking about how they would divide the provisions, and how they were going to get his money for Mr. Sheffler.
165 Q. Well, tell the jury what was said.
A. When he found out they were going, he wanted to know how he was going to get his money for Mr. Sheffler, about paying his way to Alaska, or helping pay it, and Patterson told him they were going to build a cabin for themselves and chop wood, and in that way they would pay Bird what Sheffler owed.
Q. What did Bird say?
A. He says, "Well, how do I know where you're going; how can I get my money when you won't tell me where you're going to move?"
Q. At that particular time, didn't Bird call them a set of thieves and say they were trying to rob him?
A. I don't remember.
Q. Why don't you remember that?
A. I don't remember it—if I did I would tell you.
Q. Did you hear Bird at that time call Patterson a liar?
A. I don't remember that, either.
Q. Did you see Patterson at that time hit Bird?
A. No, sir; Mr. Patterson never hit Mr. Bird.
Q. And didn't you then see Bird hit Patterson?
A. No, he never hit Patterson, either.
Q. Just at this time, you say, the conversation took place about Sheffler's part of the money; did not just what I have stated occur there between those men, and didn't you then holler, "Look out, Homer; they're getting their guns?"
A. No, sir; I never did.
Q. You're positive about that?
A. I never did, Mr. Malony.
Q. Wasn't anything said, then, from the time they sat down to eat their breakfast until the shooting affray?

A. No, sir; not between Bird and them, but between Sheffler and I. I had set some traps for some chickens——

Q. Well, never mind about that chicken business—you say there
166 was nothing further said—is that true?

A. No, sir; there wasn't—not that I can remember now.

Q. What was it you said first attracted your attention to Bird there?

A. I heard the gun click.

Q. Explain to the jury what the nature of that click was.

A. Well, you take a shotgun—it's one of the kind that breaks down this way—and when you close it it clicks, don't it?

Q. You're testifying now. Will you tell the jury what he was clicking it for?

A. Well, he had a load in it, and he had to close it, I suppose.

Q. Do you know whether the gun was loaded prior to that time?

A. I couldn't say.

Q. How do you know he was loading it?

A. I should judge so—he had it this way——

Q. Do you know so?

A. I didn't say I knew so.

Q. Didn't you see him put any cartridges in that gun?

A. No; not to my knowledge I didn't.

Q. So that was what first attracted your attention, was it?

A. Yes, sir.

Q. Now, you stated, I believe, that Sheffler looked around about that time, did you?

A. Yes, sir; about then.

Q. How did you come to know that?

A. Well, I saw him—then he jumped up and hollered, and told Bird not to shoot him.

Q. Didn't you testify on the last examination that the reason you knew that Sheffler turned around was that he told you so afterwards?

A. No, I didn't. I don't think I testified that he looked at all—don't remember that at all.

167 Q. Now—(looking at former testimony some time).

By the COURT: Proceed, gentlemen, and you can look that up in the meantime.

Q. Where was Mr. Hurlin shot?

A. Right on the left part of his head here.

Q. Did it come out on the face any?

A. It came through the top of his head somewhere.

Q. Came clear through?

A. I didn't examine the man—I didn't examine him—I saw the brains in his plate——

Q. You don't know whether it came out the front part of his head or not, do you?

A. No; I don't.

Q. And Hurlin was lower down than Bird, from where he was standing?

A. Yes, sir; he was sitting down.

Q. Did any of the missiles from the shot—the first one—strike you at all?

A. No; it didn't strike me at all.
Q. Did it strike any place in the back part of the boat?
A. There was some shot. Mr. Bird found a shot in my cup; two, I think, and some on the floor.
Q. How do you know?
A. He gave them to me.
Q. How do you know he found them?
A. I saw him when he picked them up.
Q. Were they shot that had been discharged at the time from the gun—do you know that?
A. I don't know—I suppose so. How else would they get there?
Q. You know that none of it struck you, don't you?
A. Yes, sir.

Q. Do you know whether there were shot marks in the upper
168 part of the boat anywhere?
A. I do not; don't remember.

Q. Now here's this testimony; this is the questions and answers. Did you not testify this way:
"Q. How did you know that Sheffler looked at Homer?"
"A. He looked around."
"Q. How do you know he did?"
"A. He told me afterwards he did." Did you testify to that?
A. I may have answered too quick.
Q. Now, after the shooting was over—the first two shots—how many shots were fired?
A. Three shots altogether.
Q. When was the third shot fired?
A. At Mr. Patterson, when he was in the water.
Q. Did he hit Patterson that time?
A. No; he missed him.
Q. How do you know he missed him?
A. He told me he did; I don't know.
Q. After Patterson got out on the bank, did he and Bird shake hands?
A. Yes.
Q. Did Mr. Bird say to Patterson, "I'm sorry I had to do this?"
A. Yes; something to that effect.
Q. You know that was about the identical words, don't you?
A. Yes; I think it was.
Q. You were present when he said it?
A. Yes.
Q. Sheffler was present there too?
A. Yes; he was there, for he was helping to get Patterson up to a bed.
Q. Did Sheffler overhear this, too?
A. I don't know whether he did or not; I can't tell what Sheffler heard.

169 Q. Did Mr. Bird assist you with getting Patterson to the cabin?
A. He assisted Mr. Sheffler.

Q. You followed behind with the guns?
A. Yes, sir.
Q. At that time Bird was scared about Sheffler getting hold of the guns, wasn't he?

A. He was afraid Sheffler would grab the guns from me, I guess.

Q. Now at that time when they were talking on the bank, after Patterson had come out of the water, did you hear Patterson—did you hear Sheffler say, in your presence and Patterson's, that those men wanted him to join with them in case they had trouble, and he refused?

A. I do not remember.

Q. Didn't you testify to that on the last trial?

A. I don't remember—that's been two years ago, Mr. Malony, and I don't remember whether I did or not.

Q. How is it you remember every little thing against Bird, and don't remember any of these things in his favor?

(Objected to by counsel for the Government as improper and unfair to the witness.

Objection sustained. Exception.)

Q. After Patterson was taken up to the cabin, who was the first person to see him and when did he see him, that is, outside of your own people there?

A. Mr. Thompkins and Mr. Jansen.

Q. When did they come up there?

A. The next day after the shooting, I believe.

Q. In the morning?

A. I don't remember any more; it wasn't the same day. I think it was the next day. I know they came after we had Mr. Patterson a bed made.

170 Q. Who was it first saw them coming.

A. I did.

Q. Did you notify Bird and the rest of them?

A. Yes, sir. I went in and told them that John Thompkins was coming.

Q. What, if anything, did Bird say at that time.

A. Mr. Patterson said not to let them in; he didn't want to be bothered.

Q. Did Bird at that time say he was going to give himself up?

A. Yes; he said he believed he would tell them what he had done.

Q. And give himself up?

A. Yes.

Q. Did you advise him not to?

(Objected to by counsel for the Government as irrelevant, incompetent, and immaterial.

Objection overruled.)

A. Well, we all did; Mr. Sheffler, Patterson, and myself, too, told him.

Q. Mr. Sheffler was there?

A. Yes, sir.

Q. And he advised Bird not to give himself up, did he?

A. I believe we all did. It seems to me like we all did—I don't see what else we could do.

Q. And you advised him accordingly?

A. Yes.

Q. Now, who were the next people you saw?

A. I can't remember that.

Q. How long after that was it before anybody else came?

A. Whether it was a couple of weeks, or months, I couldn't tell you, I'm sure; I think it was Black and those people who came there next.

Q. Who was with Mr. Black?

A. Mr. Redfield, Mr. Bokhardts (?), Thompkins, Jansen, and Mr. Wallace, and Jim Welsh, I believe.

171 Q. They all came up there together?

A. Yes, sir.

Q. You didn't tell them anything about what had occurred?

A. No, sir.

Q. How far was Jim's and John's cabin from where you were?

A. A mile and a half, Thompkins' was, and Wallace's was a half a mile beyond Thompkins.

Q. Now, didn't you testify as follows about that conversation on the former trial?

By the COURT. What conversation?

Q. Occurring immediately after the shooting, and while you were all there on the bank, about Sheffler testifying in regard to him taking a part in the trouble. "Mr. Sheffler told Mr. Bird that Mr. Hurlin and Mr. Patterson asked if there would be any trouble when they left, would he take a hand in it? Mr. Sheffler told Mr. Bird after the shooting that they said if there would be any trouble, or any shooting, would he take a hand in it. I think he told Bird that he said he wouldn't." Did you testify that on the former trial of this case?

By the COURT. Mr. Malony, why do you ask that question?

A. For the purpose of contradicting Mr. Sheffler, who says that he didn't.

The COURT. But that doesn't contradict this witness.

A. I'm asking her if she remembers any such a conversation. Mrs. Strong, is this the substance of the conversation as you recollect it?

The COURT. Mr. Malony, you can't cross-examine her as to that testimony. You can ask her the question as to the conversation as referred to in the former record, and by that impeach her own testimony, but not anyone's else. It is not cross-examination.

172 Q. Do you recollect testifying to that on the former trial?

A. No, sir.

By the COURT. Now ask her what she did testify to.

Q. Was that—what was the conversation about Hurlin and Patterson asking him to take a hand in the trouble?

A. Well, I told you I don't remember any more.

Q. Do you remember testifying on the former trial, in substance what I have just read to you?

A. No, I don't; because I have tried to forget about those things very hard.

Q. But a good many things against Bird you haven't forgot?

(Objected to by counsel for the Government as improper.)

(Objection sustained. Exception.)

Q. How long was Bird gone when he and the Swede went up the Yukon River that time?

A. Him and the Swede—I don't know any Swede.

Q. Well, I will change the question a bit. When did Bird's first absence take place, after the shooting.

A. After they took Patterson to Anvik.

Q. Where did Bird go to at that time?

A. Up the river.

Q. Who went with him?

A. One of Mr. Black's wood choppers was going up the river, and Bird went with him.

Q. Prior to that time had you and Mr. Sheffler been on friendly terms?

A. What time?

Q. To Bird's departure up the river.

A. Mr. Sheffler and me were always friends, and all the rest of them were friends in a certain way.

Q. I believe you testified on your direct examination that Bird was going to kill Sheffler.

173 A. I did—when Bird went to Black's. That was before they took Patterson away.

Q. What was your object in telling Sheffler that?

A. Because I didn't want to see the man get killed.

Q. Was that your object?

A. After the others had been killed, what was the use of letting him get killed?

Q. Wasn't your object to incite Sheffler to kill Bird?

A. No, sir; it was not.

Q. When Bird went up the country that time, who remained with you?

A. Mr. Sheffler.

Q. Did you sleep in the same cabin?

A. Yes, sir.

Q. Did Mr. Sheffler make love to you during that time?

A. No, sir; he isn't that kind.

Q. During the time that Bird was gone, and while you two were there together, did you plot against Bird in any way, to take his life?

A. We never did; I never plotted against him in my life.

Q. Did Mr. Sheffler suggest to you that he would chop off Bird's hands?

A. He told me afterwards that he would have chopped off Bird's hands to keep him from killing us—while he was out chopping wood.

Q. Did Sheffler tell you that if Bird struck you he would kill him?

A. He said if Bird hit me again, he would shoot him.

Q. And this occurred there after you and Sheffler had been together a week?

A. Yes, sir; after Bird got back from up the river.

Q. Very next day afterwards, wasn't it?

A. I don't remember.

174 Q. Well, very shortly afterwards?

A. Yes, sir.

Q. Now, what had aroused Mr. Sheffler to make that threat that if Bird hit you again he would kill him?

A. Well, of course he was afraid of Bird; he knew that Bird intended to kill him.

Q. Isn't it a fact that you and Sheffler got very thick during the time that Bird was gone?

A. Indeed we did not! I have enough to account for, but my conscience is clear of that.

Q. Yes, I see. Now, after this shooting, who came out of the boat first, you or Sheffler?

A. I jumped out of the boat first, I think.

Q. Where was Sheffler?

A. In the boat.

Q. What part of the boat was he in?

A. The stern.

Q. Now, who came out next, Sheffler or Bird?

A. Mr. Bird. I came first, and Bird came next to run after Patterson.

Q. Did Bird at that time have anything in his hands?

A. He had the two guns, Sheffler's and his.

Q. Now, isn't it a matter of fact—— How many guns did you carry to the cabin?

A. Two.

Q. What two were they?

A. Mr. Sheffler's and Bird's.

Q. A shotgun and a rifle, was it?

A. Yes, sir.

Redirect examination by Gen. FREDERICHS:

175 Q. Where was the other gun—you had two of them?

A. The other gun was under Hurlin's bed, I think.

Q. Do you know whether anything had happened to that gun or not as to being broken?

A. No; none of them had been broken that I know of.

Q. At that time?

A. No, sir.

Q. Do you know whether subsequently either of them was broken? (Objected to as leading.)

A. Mr. Sheffler broke his breaking ice; him and Bird went out hunting——

By the COURT. You needn't answer that any further.

Q. In response to a question of counsel, you stated that Sheffler said that if Bird struck you he would shoot him. Had he struck you?

A. Yes, sir; he hit me.

Q. After he came back from that trip when he was trying to escape?

A. No; before.

Q. You say that Sheffler said he had a notion to cut his hands off to keep him from shooting you both?

A. Yes; that was in the winter when Patterson was sick. He said he would do that before they took Patterson away.

Q. Now, state whether or not Bird made any statement, after they took Patterson up there, with reference to what he wanted to do, or had a notion to do, with reference to Patterson.

(Counsel for the defendant object to the question as immaterial.)

Q. I desire to recall the witness for the purpose of this question: Did Bird make a statement with reference to what he had a notion to do to him, when Patterson was groaning through his wounds?

176 (Objected to by counsel for the defendant as not proper redirect examination, irrelevant, immaterial; is not a part of the res gestæ, and is in relation to another question entirely.

(Objection sustained.)

Q. Mrs. Strong, did you spring up the moment Bird fired the first shot at Hurlin?

A. Yes, sir.

Q. What length of time would you imagine now from this happening—from the time he fired this shot, until you jumped and sprang past him?

A. O, well, it was all done so quick——

Q. All happened very quickly, didn't it?

A. It was done so quickly that I couldn't just tell you how long or anything. I know it was all done in such a hurry, just in an instant.

Q. You can't, at this time, estimate the time?

A. No, sir.

Q. Now, can you, sighting some object here, say about what the distance Bird was from Hurlin when you saw him bring his gun up to his shoulder and fire—not by measurement, but locating some object—me from yourself, for instance?

A. (Dist. attorney approaching witness.) His head was just about that distance; not quite, I guess.

Q. About the distance from you to me?

A. Just about now, I guess.

Q. You saw him plainly—about that distance from Hurlin, was he?

A. Just about, I should judge.

Q. Now, over where you all sat was this canvass?

A. Yes, sir.

Q. And there was large pole or something in the middle, was there, to hold it up?

177 A. Yes; you could raise it up high if you wanted to.

Q. Well, did the pipe from this stove go up through the canvass?

A. Yes, sir; a hole cut through the canvass.

Q. Why did you and the others advise Bird not to give himself up?

A. Well; because I was afraid——

(Objected to by counsel for defendant as irrelevant and immaterial.)

By the COURT. Reasons for doing things are not, ordinarily, evidence, but in this case under the evidence this might be permissible. Objection overruled. Exception.)

we were afraid—we would'nt trust any of them—anybody.

Q. Well, afraid of whom?

A. Afraid of Mr. Bird.

Q. Was that the reason you advised him as you did—not to give himself up, and that you would'nt tell on him?

A. Yes, sir.

Q. Then did you express any reason to Bird, either you or any other person at the time, give him any reason why he should'nt give himself up?

(Objected to by counsel for defendant as immaterial.

Objection overruled. Exception.)

A. I don't remember all that—it's been so long ago.

Recross-examination by Mr. MALONY:

If Bird was giving himself up, what reason had you to be afraid of him?

A. When those men came?

Q. Yes.

178 A. Supposing they would'nt do anything with him when we told on him; if he found it out he would have killed us.

Q. Was that the only reason you had for not telling?

A. I don't know any other reason. I would'nt tell if the rest did'nt. I did'nt do any shooting.

Q. Did Bird strike you?

A. He struck me once—but that has nothing to do with this—him hitting me.

Q. Didn't he push you instead of hitting you—tell you to go into the house?

A. No; he hit me.

Q. Didn't you testify on the last trial that he—after he came back from up the river that he pushed you?

A. That aint the time he hit me.

Q. It isn't?

A. No.

(Recess until 7.30 p. m.)

179 JUNEAU (*same day*), *7.30 p. m.*

C. L. VAWTER, a witness, called on behalf of the Government, being first duly sworn, on his oath testified as follows, on

Direct examination by ROBT. A. FREIDERICHS, district attorney:

State your name.

A. Cornelius L. Vawter.

Q. Where were you in the year 1898, Mr. Vawter?

A. I was at St. Michaels, Alaska.

Q. What official position did you hold at the time, if any?

A. I was deputy United States marshal.

Q. When did you first hear of this homicide in question here?

A. I think it was in the month of April, Mr. Hendricks and Mr. Blaine came down and reported the killing.

Q. Who first notified you?

A. Hendricks.

Q. Who is he?

A. He was a trader up the Yukon above Anvik, a post there.

Q. When did you first see this defendant Bird?

A. I think it was the fifteenth of June, 1899.

Q. Where?

A. At St. Michaels. Hendricks had requested the authorities to send up and arrest him, Hendricks and Blaine, and he was brought down by the military with the witnesses, and I think landed at St. Michaels the fifteenth of June.

Q. What was done with Bird after he was landed at St. Michaels by the militia?

A. They turned him over to the civil authorities.

Q. To you?

A. Yes, sir.

180 Q. Did you have charge of him?

A. I did.

Q. What did you do with him?

A. I confined him in the jail at St. Michaels.

Q. How long did you have him confined there?

A. A little over three months.

Q. Did anything occur during his confinement there with reference—that is, with reference to Bird?

A. Yes, sir.

Q. Out of the ordinary?

A. Yes, sir; he made his escape.

(Counsel for the defendant object to the testimony on the ground that it is too remote from the occurrence in question, and there are too many intervening causes to make it material.)

Q. I withdraw that question for the moment, and I will ask a preliminary question: Under what charge was he committed to your care?

A. On the charge of murder.

Q. The charge on which he is being now tried?

A. Yes, sir.

Q. Now, then, how long after you had confined him in this jail and had him in custody was it before the jail break was made?

(Counsel for the defendant object to any evidence being introduced on that point because it is too remote from the occurrence which is alleged to have been committed and the time the arrest was made, and there may be a great many intervening causes for the escape, if it was effected.

181 By the COURT. I quite often agree with counsel on matters of this kind, but I can not agree with his view now. The time that had expired, and the circumstances surrounding the parties, may indeed affect the weight or value of such testimony; but it does not affect its relevancy, materiality, or competency for whatever it may be worth. Of that the jury are the judges. That is at least my view of the question, and the objection is overruled.

Exception.)

Q. How long had he been in confinement before the jail delivery was effected?

A. A little over three months. He was confined between the fifteenth of June, and some time along about the first of July he was turned over to me, and he escaped the first day of October, and was gone three days.

Q. You may now give the circumstances of the escape.

A. Well, he cut through the floor of the cell, a four-inch floor——

(Objected to by counsel for defendant as immaterial.

By the COURT. The method of escape may be shown as well as the escape itself.

Exception.)

——he cut through a four-inch floor and crawled out under the jail and made his escape, and was captured on the third day after his escape on an island between St. Michaels and the mainland.

Q. Who captured him, if you know?

A. I sent all the men out that I could hire to hunt, and offered a reward, and got the Indians hunting him——

182 Q. A reward for what?

A. The capture of Bird—five hundred dollars.

Q. Did you pay that reward?
A. I did.
Q. What, if anything, did you discover in the jail after his escape?
A. I discovered a case knife we got, which it is supposed he did the cutting with. Previous to that we had taken it away from him. It was made sort of in the shape of a saw.
Q. Are those the instruments you hold in your hand?
A. Yes, sir.
Q. When did you take those effects away from him?
A. Soon after he arrived.
Q. The other one here—you found that where?
A. Right after his escape, in the jail.
Q. Whereabouts?
A. In the cell, or sleeping bunk.

Cross-examination by Mr. MALONY:

How long have you been in that country?
A. I arrived at St. Michaels on the 6th of August, 1898.
Q. Pretty familiar with that country, are you?
A. In and about St. Michaels I am.
Q. About how far is it from St. Michaels to Nome?
A. Across the bay it's a hundred miles.
Q. Is that the usually traveled route?
A. In the summer time, yes, sir. In the winter time it's much further around the coast—two hundred and thirty-five miles.
Q. About how far is it from St. Michaels to Anvik?
A. I think about five hundred miles up the river.
Q. And Camp Dewey?
183 A. Camp Dewey, I think, is eighty-five miles above.
Q. And to Holy Cross Mission?
A. I don't know just where that is.
Q. That is where Brother Chapman was, isn't it?
A. Chapman was at Anvik.
Q. And that's five hundred miles?
A. Yes; I think in the winter time they make some cut-offs.
Q. You heard of all the men who were witnesses on this case that were up there at that time, didn't you?
(Counsel for the Government objects to the question on the ground that the same is not proper cross-examination.
Objection sustained.)
Q. I will ask you if a subpœna came into the hands of an officer at Nome, could he make the trip to Anvik and back in forty days?
(Objected to as not proper cross-examination.
Objection sustained. Exception.)
Q. When was Bird arrested, if you know?
A. I think he was arrested in April; that is, I think the soldiers who were sent up from St. Michaels got in there in April.
Q. When did he attempt to make this escape from your custody?
A. He must have commenced soon after he was confined.
Q. And when did he escape?
A. The first of October.
Q. About six months after he was arrested?

A. About six months.

Q. What kind of a cell was Bird confined in there?

A. He was—the inside of it was wood, and the outside of it was
184 corrugated iron; there were two inch planks all around the cell's inside, laid crossways, and inside of that was lined with two-inch planks.

Q. Was there any windows in the cell?

A. No, there wasn't; the door was a slat door.

Q. And that was the only light or air that he had, wasn't it?

A. Yes, sir; this door with lattice, slats across it.

Q. And you had him in there from June until the first of October, too, didn't you?

A. Yes, sir.

Q. What was the size of the hole Bird escaped out of?

A. Eight by eleven inches. I first thought it was seven by ten, but I was afterwards told by a party that measured it that it was just eight by eleven.

Q. You don't know of your own knowledge that it wasn't seven by ten?

A. No, sir.

Q. Do you know where the smaller knife of these came from [referring to knives exhibited]?

A. Out of the cell.

Q. Did you take it out yourself?

A. It was handed me by a guard.

Q. You didn't take it out yourself?

A. No, sir.

Q. Do you know of your own knowledge where he got it?

A. No; it was the same kind of a knife they used to feed the prisoners with.

Q. Where did you get the other knife?

A. That was handed me by the guard.

Q. And you didn't get that yourself, either?

A. No, sir.

Q. Do you know of your own knowledge where the guard got it?

A. No, sir.

185 Q. Of your own knowledge, you don't know?

A. No, sir.

By Mr. COBB. We now ask that the exhibits be excluded from evidence and that all testimony with reference to them be stricken out, as based on hearsay, and withdrawn from the jury.

Motion sustained.

(The Government rests.)

By Mr. MALONEY. If the court please, we will want some time to look up our notes and arrange our testimony. Can't we adjourn for the evening now?

By the COURT. Oh, well, we have had about ten or fifteen minutes' work this evening. Can't we get through with other witnesses?

By Mr. COBB. If the court please, there are two witnesses for the Government that haven't testified yet, and we didn't expect to put our testimony on until after they had testified; so we haven't notified some of our witnesses to be here this evening.

By the COURT. Well, get them. We will proceed for a while.

By Mr. MALONY. Call Homer Bird.
By the COURT. Do you desire to be sworn, Mr. Bird?
A. Yes, sir.

HOMER BIRD, the defendant, being first duly sworn, on his oath testified as follows:

On direct examination by Mr. MALONY:

State your name.
A. My name is A. H. Bird.
Q. State your former place of residence.
A. The city of New Orleans.
Q. What was your business?
A. I was a contractor.
Q. State if you're acquainted with the witness Charles Sheffler.
A. Yes, sir; I got acquainted with him after he was in my party.
Q. Mrs. Strong?
A. Yes, sir.
Q. And the men Patterson and Hurlin?
A. Yes, sir.
Q. State how you first became acquainted with Sheffler and Patterson.
A. In the year 1898, in the month of February, the day I disremember now, between the hours of nine and eleven, I went to the L. D. M. Stock Exchange, of which I was a member. I sat at one of the tables in the reading room, a-reading the Daily Picayune, and I seen this ad. And I said to a friend of mine who was there, Louis Huberts, "What do you think of this;" whereupon I read to him the ad. which I had seen.
By the COURT. Now, never mind what he said.
Q. Well, after reading the ad. what did you do?
187 A. Huberts answered the ad.
Q. Well, what resulted from the answer?
A. Two days later I received an answer stating that if I had the necessary funds to the amount of five hundred dollars I might become one of the party, signed Charles Sheffler, address to post-office box, the number I now disremember.
Q. And what was the result of that?
A. Huberts answered back that I had received the letter, telling him that I could be seen any day at the L. D. M. exchange between the hours of twelve and one o'clock.
Q. Did you afterwards see him there?
A. About two days afterwards or thereabouts the janitor of the exchange walks in to where I was sitting in the exchange and says, Mr. Bird, there's a man that would like to speak to you. I says, bring him in, and when he showed him in young Sheffler came in and says, I would like to see you for a few minutes; says he, my name is Charles Sheffler, and I am the party who has had some correspondence with you about going to Alaska. Now, Mr. Bird, if you can make it convenient to make an appointment to meet me at the corner of Garden and Garonne streets I will bring the party who is interested with me and we will interview you. I said, very well, Mr. Sheffler, and there I left him. I

went at the appointed hour and there I met this young Sheffler and a man he made me acquainted with by the name of Patterson.

Q. Was that the first time you had ever met Patterson?

A. Yes, sir; and he says to me, Mr. Bird, when can I see you to talk over the prospective trip to Alaska? I says, you will find me at the exchange at any time between the hours of twelve and one o'clock. Said he, I would like to have you come out to the house. I live on Canal street—the number I now disremember. At this young
188 Sheffler says, I will meet you at the exchange to-morrow at the hour of one o'clock, and we will go out to the house together, to which I agreed; I bid him good day, took the cars, and home I went. The next day I met young Sheffler as we had agreed, and we took the street car and went out to where Patterson lived, and Patterson came out himself to meet us. He took us in, told us to be seated, and he then went in the other room and brought out all his letters, maps, papers, and so forth, and said: Now, Mr. Bird, I and Mr. Hurlin—who wasn't present—and Mr. Sheffler are trying to form a company of five to go six hundred miles up the Yukon River, to prospect for gold. He then explained to me on the map the route which he thought of taking, told me that he had figured the trip would cost twenty-five hundred dollars, and that it would cost each member of the party five hundred dollars each for the complete outfit and expenses en route. You see, Mr. Bird, I have been corresponding with a view of obtaining San Francisco prices of the tonnage on freight up the Tanana, the prices of provisions, breadstuffs, and so forth, also the price of two boats—small boats, a scow and a launch—and I have the figures on the entire outfit. Now, Mr. Bird, look over the letters and the price lists and maps and see what you think of the proposition. I did so, he all the while explaining to me the features of the trip. Now, Mr. Bird, you see I have taken the information at hand, have figured the cost from that, and can tell identically what the trip will cost, and you will see that I have plenty of margin to work on, as we would hardly want it to cost any more than that for the trip. We can all leave for 'Frisco, buy the outfit, make our contracts for the transportation of provisions and the like, and when we arrive at St. Michaels I think
189 we can make a cheap contract with one of the companies and get into the country before navigation closes; I think we ought to buy a ton of coal for twenty-five dollars, and then you see——

Q. Now, Mr. Bird, was that the first meeting that you and Patterson and Sheffler had?

A. Yes, sir.

Q. When did you first come in contact with Hurlin?

A. About the beginning of March I received a note in my box at the exchange asking me to call at Patterson's house any time after six o'clock. I did so. There I met Patterson, Sheffler, and Hurlin, and the other party——

Q. That was to go along with you?

A. Yes, sir; Patterson gave me an introduction to him as one of the party.

Q. And what transpired there at that meeting?

A. We all agreed to put up five hundred dollars.

Q. Was Sheffler present?

A. Yes, sir. We then got to talking about what we would all do, and what we did do, and what we wouldn't do. Sheffler was to be the cook, Patterson the engineer, I was to steer the boat, and the other party we took in as a roustabout.

Q. Was Sheffler to also put up his five hundred dollars at the time?

A. Yes, sir.

Q. When did you have the final meeting—the consummation of the project? Did you make any definite arrangements?

A. Yes, sir; we had a meeting about that time, at which Mr. Patterson made the remark, "Mr. Bird," he says, "I think it would be a good idea to take some sheepskins to that part of the country; it will probably be cold up there, and we can use them for clothes and such
190 like, and they will come in very handy." He said that Mr. Sheffler's father had a tannery and he could obtain them there at a very reasonable figure; we were on our way to the train, and after we had finished through with our business there we started to our homes, and we fixed the next day as a time for to meet down at the exchange. So the next day, according to arrangement, we met at the exchange, and we were talking about the skins and he says to me——

(Counsel for the Government objects to testimony about this sheepskin business as immaterial, incompetent, and irrelevant.

Objection sustained.)

Q. Well, proceed with the material parts of your testimony, Mr. Bird—when did you have your last meeting before the man left for 'Frisco?

A. Before—the last meeting we had, it was in regard to those hides——

(Objected to for the same reason—he's going into that again.)

By Mr. MALONY. If the court please, this is a part of that last meeting.

A. ——And I have to tell that so as to come to where I found out that Sheffler didn't have no money.

By the COURT. Go ahead.

A. And we were on our way out to the Patterson's house and we all agreed to take six hides each. I was to take twelve—no, I was to take fourteen, twelve for the trip, and two for home, and a few mornings later I dropped into the exchange, where I met Mr. Patterson, and we got to talking about the races. And Patterson asked me if he knew of anything going on at the races and I told him no. He says if you would like to go out, I will meet you at a quarter after one at the exchange, and we would go out. I told him I wasn't interested in the races,
191 but finally agreed that I would go. So at a quarter after one over he came, and he had young Sheffler with him. So in the cars, on the way to the tracks, we got to talking, and Sheffler said he didn't think he would go to the tracks, and wanted me to loan him ten dollars——

(Objected to by counsel for the Government as irrelevant, incompetent, and immaterial.)

Q. Well, what did you do?

A. So I loaned him the ten dollars, which he said he would pay back in a few days, and he went out to the tracks and gambled——

By the COURT. Mr. Bird, don't talk about all that sort of things. Get through with what you have to say about this case, and don't talk about visiting the race tracks or anywhere else.

Q. Just keep to your meetings; never mind these side issues, Mr. Bird. When did you have your final meeting?

A. The last one?

Q. Yes.

A. It was in the month of April.

Q. That was prior to the time that Sheffler and Patterson and Hurlin had left for 'Frisco, was it?

A. No; they hadn't left for 'Frisco.

Q. I say it was prior to that time?

A. Yes, sir.

Q. Was it known at that time that Sheffler wasn't going to put up his five hundred dollars?

A. Yes, sir.

Q. How did you find that out?

A. Patterson said he had a friend that was going to back him and he wouldn't do it.

Q. So he never put it up?

A. No, sir.

192 Q. State what was done about the tickets and the money to be advanced at that time.

A. Patterson got Hurlin and Sheffler to go on to 'Frisco. Hurlin quit his situation, and we were talking about them going to 'Frisco, when, says Mr. Patterson, "Don't you think it would be a good idea to let them go on ahead to 'Frisco, and let them start in and make contracts on provisions, transportation, and so? There is a good deal to buy and," he says, "that will give me and you a chance to stay behind a while and straighten up our business." So, a few days later, came to me and says, "The boys are going to start this evening," and he wanted us to put up a forfeit of a hundred dollars that we should go on the trip—a hundred dollars each. I said I was perfectly willing to do so, and I made the arrangements at the ticket office for tickets and planked down the hundred dollars in twenty dollar bills, and Patterson got a check later on, I learned, for a hundred, and that evening we bought their tickets and that evening they was to start on their way. The next morning I dropped in to see Patterson, and Mrs. Patterson remarks, "The boys didn't get away, did they?" So they didn't leave there until the 10th of April.

Q. For San Francisco?

A. Yes, sir.

Q. When did you and Patterson and Mrs. Strong follow?

A. The first day of May, Sunday morning.

Q. And arrived in San Francisco about what time?

A. The evening of the fifth, about nine o'clock. They were stopping at the Yosemite Hotel, and Patterson got acquainted with a lady on the train and we took quarters with her.

Q. How long did you remain in San Francisco?

A. Until the 21st or 20th; I disremember at the present time.

193 Q. Did you procure your outfit there?

A. Yes, sir.

Q. About what was the cost of that outfit?

A. In the neighborhood of about nineteen hundred dollars.

Q. And what amount of that or what proportion did you put up?

A. Ten hundred and sixty-five dollars, or thereabouts.

Q. And Hurlin put up how much of that sum?

A. He put up four hundred and forty-six dollars, and Patterson put up four hundred and forty-three dollars and sixty cents.

Q. And Sheffler?

A. He never put up a cent.

Q. You sailed on the "Rufus E. Wood" from San Francisco, did you?

A. Yes, sir.

Q. When did you arrive at St. Michaels?

A. On the morning of the third of July—about two o'clock in the morning of that day.

Q. And when did you start from there up the river?

A. About the seventeenth, I think.

Q. Now state to the jury when you arrived at the point where you made your winter quarters.

A. About the beginning of September—the second or third.

Q. Now state how you came to stop at that particular place.

A. There was a coal mine there, and you see I was in a launch, and there was some fellows there on the side of the mountain digging, and we stopped there for a while, and Bob says we had better run into this little slew there and put up; so we run in there, and the boys got to looking around and found some coal there and thought they had struck coal.

Q. State whether or not you wanted to stop at that particular place or not.

A. No, sir; me and Hurlin wanted to go right on ahead.

Q. And you finally did stop there?

194 A. Yes; Bob got disgusted a great deal with the country and everything else. Some of these miners would come down the river in boats, and they would tell that the country was a fake, and Bob said he would'nt give fifty cents for the whole country if they gave it to him; he wanted to get back.

Q. Now, after stopping there, what did you proceed to do?

A. We then proceeded to build a cabin.

Q. Now, what was the size of that cabin?

A. About twenty by eighteen.

Q. State now how long you were building that cabin.

A. We was building on that until the evening of the 24th.

Q. State if any difficulty or differences took place between you men there of a serious nature up to that time.

A. None whatever. In the beginning, when we started to work on the cabin, Patterson was cutting down trees—him and Hurlin—and Patterson got disagreeable on account of a tree that had fallen the wrong way.

Q. But it was nothing of any serious nature, was it?

A. O, no; nothing serious.

Q. What, if anything, occurred about that time?

A. On the evening of the 24th, after supper, Patterson and Hurlin and Sheffler got supper and took a walk on the beach, and I went up to the cabin, and a few minutes afterwards they came up, and Hurlin acted as the spokesman at the time, and he says, "Mr. Bird, we three boys have decided to pull away from you and the woman."

Q. Yes; well, what else?

A. I asked what was the matter—if the woman had said anything; he says, no. I says, "There must be something wrong and I would be glad for to have you tell what it is." He says, "Well, we have decided to go and build a cabin for ourselves, and give up mining and go to chopping wood."

195 Q. Well, did you raise any objection to that?

A. No, sir; none at all.

Q. State if that was all that was said at that time.

A. Yes, sir.

Q. State when any conversation in reference to the matter occurred again.

A. Well, they agreed then to help me put up the cabin—or we had it partly built, of course, any way to finish the roof on the cabin; and following that, on the 26th, the eveningof the 26th, we had just got the moss on the cabin, and Patterson wanted to take two boats and push away at the time. But I told him he better wait until we got more mud onto the cabin; we made the filling of mud so she wouldn't leak on us. He didn't want to do that, and insisted on taking the two boats and getting away, but finally he agreed to wait a day or two later.

Q. What, if anything, was said about dividing the provisions?

A. Nothing at the time. But they stopped and worked on for a day or two, and in the meantime I asked him what he was going to do; there was only one ax in the outfit, and one stove, and one saw; that we couldn't both take them with us. He said very well, you take the cabin for the share of work we done and we have got to have them. You can cut a hole in the side of the hill there and use that for a stove.

Q. When was the first time anything was said about dividing the provisions?

A. Not until the morning of the 27th.

Q. What was said at that time?

A. I was up at the cabin working, and young Sheffler came up and told me to come down, they wanted to divide the provisions, and I came down and the three followed me in the boat, and with that the woman

196 said "Breakfast is ready," and I went in to get my breakfast.

Q. Prior to that time had the woman said anything to you about the men going away?

A. No, sir; only she told me she heard them plotting against me in the woods.

Q. Did she tell that to you?

A. Yes, sir; right in front of their faces, too.

Q. Now, this conversation you spoke of was on the morning of the 27th?

A. No, on the 26th; you see on the evening of the 26th I went back to the cabin to finish up some work I had to do there after supper, and Naomi told me that Bob and Hurlin was talking about doing me up.

By Gen. FREDERICHS. That who was?

A. That Bob and Hurlin was. You see in making this cabin we crossed the logs this way and one of these wasn't fitted in and we was up there working and the woman stood up there helping me with it on one end, and she told me they was plotting against me—intended to do me up.

Q. That was on the evening of the 26th?
A. Yes, sir.
Q. Was anything said to you by them that evening?
A. When I got down to the boat they was all in their sleeping bags, and I couldn't see their guns nowheres.
Q. Now, on the morning of the 27th what occurred?
A. On the morning of the 27th Sheffler and Hurlin got up first and made coffee and went up into the mountains, and I got up, got a cup of coffee and gave the woman a cup in bed—Patterson was sleeping on the opposite side—and I put on my hat and went up to the cabin and was working on this log I tell you of, and a half hour later Sheffler came and told me—it might have been a half hour or an hour later—Sheffler
197 came and told me that Patterson wanted me to come down and divide the outfit. I said all right, and down I came a few minutes after.
Q. When did the discussion about dividing the provisions take place?
A. After breakfast.
Q. What was said at the time about dividing?
A. I asked Patterson what basis he was going to divide the provisions on and he says five equal shares. I says I don't think you're entitled to it on the basis of the money we furnished, and I says, let's go and get John Thompkins and some of the boys to refer it to——
Q. What reply did he make to that?
A. He says they aint got a God damned thing to do with the provisions; we will suit ourselves about that. And I says, what am I to do for this money I have put up for Sheffler and the money I have put into this thing. He says we expect to go to work chopping wood and make that up all right as far as Sheffler is concerned. Says I, how can I find Sheffler if I don't know where your going? You wont tell me whether you're going up or down, or where, and I can't arrange it that way. Finally Hurlin speaks up and says, "We don't owe anything, as far as that's concerned." I says, "Yes, you do; we made up the accounts on the way up from San Francisco, and I'll just show you that you do." With that, we goes and gets the grips and we was comparing our bills, and he was ringing in on board and lodging of Sheffler who failed to put up a cent, and a good stiff price on the goods, and finally I says, "You fellows are a lot of thieves; you made 10 per cent on them goods in 'Frisco and now you're ringing in all this stuff; you must want to rob me." With that Patterson says, "You're a God damned
198 liar;" I says, "You're another," and he struck me one in the ribs and I struck him back——
Q. Where did you strike him?
A. I got Patterson in the eye, and gave him a black eye.
Q. Now, come here, Mr. Bird, a minute. You remember there was a diagram drawn out at the last trial of this case. Now, here is one (referring to diagram identified by Sheffler) that is supposed to represent that scow. Will you take this ruler and point out to the jury there the different points those are supposed to represent?
A. Well, this is a water barrel we got at San Francisco, and Sheffler knocked it together, and put in little holes for the purpose of sawing it in two for wash tubs.

Q. What is that supposed to represent there?

A. Our sleeping bags. The boat was lined with provisions, you see, and we had our clothes under those bags. This represents I and Mrs. Strong's bunk.

Q. What does this bunk here represent?

A. That's Mr. Patterson's; he slept opposite us.

Q. Where did Hurlin and Sheffler sleep?

A. Hurlin slept here and Sheffler slept here; the two slept together, right across there. We all had these sleeping bags.

Q. Where was this stove, here?

A. It was sitting on a seat there; it was—now, I had made a piece of plank, sort of lining there, to keep it from burning the seat. You see, when they steered the boat it was too long there and in the way, and I fixed it so Patterson could steer it, just like a regular boat, you see.

Q. What was the length of this boat?

A. It was supposed to be thirty-two feet long and they had it cut down either two or four feet, I'm not positive which, so it was either twenty-eight feet or thirty feet long.

Q. What was the width?

199 A. About seven feet, six or seven.

Q. State whether it was wider at the center than at the stern.

A. Yes, sir; it was one of these boats made in the same shape as a skiff.

Q. Sloped to the stern, did it?

A. Yes, sir.

Q. About what would be the width of the boat at the stern?

A. The width of this boat from here to here would be about four feet six, giving it full.

Q. How much space was there between the end of this seat here and this place where the grub box sat?

A. Just about big enough for this water barrel to fit in there.

Q. Take a pencil and mark in there about to where this water barrel would come.

A. The water barrel would come about here. You see the woman used to use that to put the bread board on top here, and lay the cooking things on, and so forth.

Q. So this barrel would fill that space up there, you say?

A. It would fill it all up and leave a small place about six inches I should say.

Q. About what was the dimensions of this stove?

A. The stoves must have been—it was one of these Klondike stoves—about three feet, perhaps, in that neighborhood.

Q. What, about, was the dimensions of that grub box?

A. You see it came up here from the same line like, this way, and we put this in back here to keep the wind off.

Q. And the dimensions?

A. In the neighborhood of three feet, a little over half the boat, because we had made an upright, sort of a little "T," on this place here to shove up the canvass to keep the water off.

Q. What was in this space here?

A. On this space here, they've got this all entirely wrong. I'd

like to draw a map of that boat—this is all wrong, this never came half in that position at all.

A. All right sir; you just draw one right here and now before this jury [witness draws diagram]. Now point out to the jury, Mr. Bird, the different things represented on your map.

A. This here is the seat. This is the back of the seat, and this is the stove, and this was a chair. Now, this, where they claim we was sitting there was no breach at all there, for there was boxes set in the bottom of the boat, and this is the provisions box. You see we used the provisions out of here, and this was a box set up on top of the provisions, as the provisions was all piled up even with the top of the boat all the way across from this point to this point here, and this was a seat here. And this is where I and the woman slept, and Patterson there. There is a small passage way in here, about room enough for another to sleep in say—this passage way is through here, and the edge of the box stood out here like that.

Q. How much of the room there would this grub box occupy?

A. A little over half of the boat.

Q. About what was the width of the boat there?

A. About three feet.

Q. Would there be room enough for three men to sit in there between the grub box and the seat?

A. No, sir.

Q. What would be the difference between the seat and this here?

A. About two feet. You see it was hardly room enough for the woman to get into to do the cooking.

Q. Now, where were the guns kept?

A. Hurlin's, you see there was an awning came over the boat like that, I built that myself; and they had their guns strapped on top, tied to this, right across there.

Q. Where was your gun kept?

A. My gun, I put that—that, you see from the first beginning I shot ducks and geese along the way, and I kept it handy, so on coming into the boat I hung it up here so as to keep it away from the stove.

Q. Near the water barrel?

A. Yes, sir; I would always, of course, see the geese in the mornings, and I had it where I could grab my gun and shoot.

Q. Where was it on the morning of the 27th?

A. Right in the same place.

Q. Now, on the morning of the 27th, when Mr. Sheffler called you down, who did you find down at the boat when you got there?

A. Mrs. Strong was in the boat; I found Patterson and Sheffler and Hurlin, they was cutting boughs to throughs the provisions on.

Q. What was said when you came down, if anything?

A. Nothing was said. I came in and got breakfast. I jumped on the boat and they came right behind; the woman called that breakfast was ready, and we went in and sat down to get breakfast.

Q. Was anything said during your breakfast about dividing the provisions and their going away?

A. Not only after breakfast.

Q. Now, then, tell the jury in your own way what occurred after breakfast.

A. After breakfast I say to Patterson—Patterson says, "We're going to divide the provisions." I says, "Lets send down for John Thompkins," and Patterson says, "Thompkins hasn't anything to do with it." You see Patterson was the man that acted as spokesman.

Q. Well, go on.

A. I says, "What about this hundred and sixty-five dollars that Sheffler owes me," and he says, "I guess you'll have to look to
202 Sheffler for that." "Well," I says, "I don't know whether you're going up or down the river; into Dawson, or out to the States, or where, how can I tell whether I will get it." With that, Hurlin says, "We don't owe you any money, anyhow," and I says, "Yes, you do; we figured that up on board the 'Rufus Woods' on the way up. I'll just show you." And he went and got his valise and set down on the bunk with Mr. Patterson, and I sat on the opposite side and we were comparing bills, and Hurlin had his board, and Sheffler's board and his expenses marked on the bill, and it made in all over five hundred dollars, and I told him—I says to him, "You fellows are nothing but a pack of thieves; you made ten per cent on them bills in Frisco," and Patterson says, "You're a liar," I says, "You're another," and with that we dug into each other.

Q. And what happened?

A. He struck me and I struck him.

Q. Where did you strike him?

A. In the eye, and I knocked him off the sacks and he fell down, and with that Naomi hollers, "Look out, Homer, they're getting their guns." Hurling was coming up with his gun under his sleeping bag, one end of it this way. I shot Hurlin, and Patterson ran to the bow of the boat, he had to stoop like that, and he jumped for his gun and as he did so, I shot him.

Q. Come to this map and point out just where you were when you fired the shot at Hurlin.

A. I was in here; I jumped down here and got the gun and stood right about here; Sheffler and the woman was here.

Q. Where was Hurlin?

A. Hurlin was here, reaching for his gun under the sleeping bags and had it under his knee like this way.

Q. And where was Patterson?

A. He was jumping from here over against the edge like—you
203 see the rifle was right in here. I had seen that gun there before, for Sheffler had it out and brought in and set it down there. He was going for that.

Q. Where did Patterson—that's all right; you can take your seat now.

A. You see, when Patterson was hit he ran over here and fell off the boat.

Q. Now state where Hurlin was shot.

A. Hurlin was shot in the side of the face—got shot all in his temple here.

Q. State what, if anything, he had in his hands when he was shot.

A. He had the rifle in his hands, and the end was caught in the sleeping bag, like.

Q. State what effect that had on the rifle.

A. When Hurlin was shot he fell over in towards the box there, and he had his rifle hold of it this way, and when he fell over he fell with it under him and broke, I believe; when he was dead he still had a grip on the rifle.

Q. What effect do you say that had on the rifle?

A. Split it right across.

Q. Where, now, was the other rifle?

A. The other rifle was up in the bow of the boat.

Q. State, now, in what position Sheffler was when you fired.

A. He was in the stern of the boat——

Q. No, no; I mean Patterson.

A. He was jumping from the top of the provisions, there, over to the bow of the boat to get the other rifle—I thought he was.

Q. How close was he to it?

A. About a foot or two away from it.

Q. Reaching for it, wasn't he?

(Objected to by counsel for the Government as leading. Objection sustained.)

204 Q. Now, point out to the jury, on my shoulder here, just where Patterson was shot.

A. You see, Patterson was shot in the muscles of the neck here (illustrating), and a couple of shot caught him right through there. If I had been sitting behind them, as they say I was, and had shot him down here I would have knocked the man all to pieces—tore that whole arm off.

Q. State what kind of a wound that was, large or small.

A. Just a couple of small wounds there.

Q. On the top of the shoulder, here?

A. Right through the muscles—wasn't a bone broken at all, because he got out and chopped wood after that just as well as I could.

Q. About what distance was Patterson off when you fired at him?

A. This boat (illustrating on map) from here to here, taking off the two feet that I speak of, it must have been twenty-five feet, or twenty-four. You see he was jumping over here.

Q. Now, Mr. Bird, you heard Mrs. Strong testify that you was standing on your bunk and that Patterson and Hurlin were sitting on this seat. Now, if you had been sitting there, and that had occurred as she she stated it did, what distance would that have left you from Hurlin?

A. You see, if Hurlin had been sitting there—you see, my gun was one of these made-to-order English makes, and cost me two hundred and fifty dollars, and it was about forty-six inches long. Now, you see, if Hurlin had been sitting there I would have had that gun right over his head like that, and the shot would have took the whole top of his head off; that man would never have been able to set there as he did and then fall over——

(Objected to by counsel for the Government as arguing the question to the jury. Objection sustained.)

205 Q. Now, Mr. Bird, how many shots were fired there?

A. Only two.

Q. Was a shot fired at Patterson while he was in the water?

A. No, sir; I never shot at him in the water at all. You see, Patterson ran out here, and I nev'r shot at him at all after that first shot.

About half of that boat was on the shore, and the other half of it was in the water, and in getting out he tumbled right out this side—fell over; he had these big, heavy mining shoes on and tripped over.

Q. Didn't get in the water at all then?

A. No, sir.

Q. Now, what conversation occurred immediately after the shooting, at the bow of the boat there?

A. Patterson began to cry, and says, "Homer," he says, "don't shoot any more; shake hands," he says, and I grabbed him by the hand. He says, "We promised our families we would do the best we could, and now see what this has come to. These men insisted on doing you up, and I was going to tell you about it, but instead of that see what has happened; I've brought this on to myself, and you had a right to kill me," and may I drop dead on this stand if that ain't the God Almighty's truth, and that man was telling a bare-faced lie on the stand about that!

Q. Well—, now, what, if anything, did Sheffler say about them wanting him to join——

A. He said, "They wanted me to take a hand in this trouble, and I refused." I says, "Yes?" and he says, "No." I says then, "Yes; you're as deep in the mud as the others were in the mire," and he went down on his knees and says, "I swear to God, Homer, that I had nothing to do with it."

Q. Was Mrs. Strong present when he said this?

A. The three was present; they came running out of the boat.

206 Q. Now, what was done with Bob then?

A. We took him up to the cabin.

Q. Who took him up to the cabin?

A. Sheffler took him up to the cabin.

Q. Did anybody assist him to get up there?

A. No; he went up just as well as you or I could. We was going to take him into the boat and he wanted to go on up to the cabin; I says, "You better get the medicine and some rags and bring them up."

Q. When was it the woman went up to the cabin?

A. I sent her up there with the articles. After we had Bob dressed me and Sheffler made him a bed.

Q. Who had the guns?

A. I went in and got the guns and broke them, and took out the shells and gave them to Naomi.

Q. How many guns did she have?

A. The three guns.

Q. How long did Sheffler remain there—or Patterson, I should say—how long did he remain there before they came down and took him up to Anvik?

A. He was taken to Anvik somewheres around about the twelfth of March, the 11th or twelfth of March.

Q. Now, on the next day after the shooting, who, if any person, did you see?

A. The next morning after the shooting, about eight o'clock of that morning, Naomi was in the door, and we was in building a table, and she says, "Homer, here comes John down with two strangers." I says to them, "Boys, I'm going to give myself up." With that Bob says,

"Don't you do no such a thing," and he says to Naomi, "You tell them we ain't here; that we've gone out mining," and begged me not to give myself up.

Q. Who begged you not to give yourself up?

207 A. The three of them.

Q. Mrs. Strong, Patterson, and Sheffler?

A. Yes, sir.

Q. Did she go and talk with the men?

A. Yes, sir; she went and told them that we wasn't there.

Q. Did you intend to give yourself up at that time?

A. Yes, sir; I wanted to give myself up right after the shooting.

Q. When did you next see anybody there?

A. The next morning they came about the same hour. They came and wanted to borrow the small boat to go up to Kaltag. Bob didn't have no objections, nor did I, and so they took the boat. I says to Bob you better write on a piece of paper some medicine for your wound, and he wrote iodoform and carbolic essence, and I told the woman—she usually kept all my money—and I told her to give them the money to get it with. The next morning, I believe it was, they came back. On their way they broke the glass in the steam gauge and they didn't go any further—made about fifty miles or so and came back.

Q. When did you next see anybody?

A. Was when John and Jim came down afterwards and the woman and Sheffler was down below about a half a mile cutting grass to make beds with, and they found John there when they came back.

Q. Now, you may state, at the times when people came there, if there was anything to prevent Mrs. Strong and Sheffler from telling on you if they saw fit?

(Objection by counsel for the Government on the ground that it calls for the opinion of the witness.

Objection overruled.)

Q. What was there, if anything?

A. There was nothing whatever. I and Sheffler used to be out cutting wood, and John used to come Saturday night and remain

208 over until Monday morning, and they certainly had plenty of chance if they wanted it.

Q. Now, when did you go down to this post?

A. About a week later. I and Sheffler we took the little launch to go and see if we could get this iodoform or carbolic water, and we met a gentleman by the name of Black, and another by the name of Buck, and another by the name of Redfield——

Q. All at the post?

A. Yes, sir; and Black was cutting one of their hairs and Sheffler stayed in the boat, and I went to the cabin and asked if they had any medicine, and they said no, that Hendricks had promised to send them medicine and forgot all about it.

Q. How long did you remain there?

A. We remained there about two hours. I finished cutting their hairs and they invited us for dinner, and Sheffler and I both, and Sheffler brought my gun up from the boat. You see, there was a great deal of wolves in the country, and Black wanted to buy my gun terribly bad. I

told him I couldn't spare it, and he says: "Well, Mr. Bird, if you ever leave the country, I wish you would promise to sell it to me before you go"——

Q. You remained there an hour?

A. Yes, sir; or an hour and a half.

Q. Was Sheffler also talking with the men?

A. Yes, sir.

Q. Did he at that time have an opportunity, if he saw fit, to tell them about this shooting?

A. Certainly, he could have told them.

Q. Now, when were you arrested, Mr. Bird?

A. I was arrested on, I think, the 6th day of April; somewheres around there.

Q. Now state to this jury if at the time the shooting occurred,
209 and those men were in the position you say they were, making for their guns, if you believed your life was in danger.

A. Yes, sir; I did.

Q. When do you say you were arrested?

A. Sometime about the 6th of April—in the month of April anyhow.

Q. When did you go down to—that was up at your camp, was it?

A. Yes, sir.

Q. Where did you go from there?

A. From there to Anvik.

Q. How long did you remain at Anvik?

A. Remained there until somewheres in the month of June. I don't remember the exact date—that I have forgotten; but they went to work and put us on separate boats, and they held me back so they could go on ahead and arrive first, but we finally overtook them at the mouth of the river, and we arrived in St. Michaels somewheres about the seventeenth of June.

Q. You were then turned over to the deputy marshal?

A. Yes, sir.

Q. And you made your escape from jail?

A. Yes, sir; but I was let loose—didn't make my escape.

Q. How did you get loose?

A. I was given my freedom by one of the guards.

Q. State how that was.

A. This woman went to work and told them that they didn't want to let me loose to kill people, and they had six guards around there, and this man says, "Bird, before I'll see you treated this way I'll let you go," and I didn't get out of that hole either.

Q. You say you didn't get out of that hole that's been testified about?

A. No, sir; this room we was in it was nothing but a small room
210 without windows or ventilation or fit for anybody—especially a white man—to be in, and they had five guards over me, Mr. Helms, and they had—there was a man by the name of Dr. Burns was a witness to this, too, and a fellow by the name of Mike, and a soldier by the name of Beersogs, and an Englishman he came down here with us, now in this room; and there was also, as I say, six *our* eight guards, soldiers, and they had a man walking the pickets all the time.

Q. Now, Mr. Bird, state if you had fired from the position in which

Mrs. Strong said you did, wouldn't the shot have struck the back part of the boat, or in here [indicating]?

(Objected to as leading and as repetition.

Objection sustained. Exception.)

Q. What would have been the effect if you had fired the shot from where you have heard her say you did?

A. The shot would have went through and caught her.

Q. State what, if anything, had occurred up at this part of the boat after the shooting in the way of shot marks.

A. Over here [indicating on diagram]—the marks was over here.

Q. Yes; where the shot struck. Now, do you know whether Thompson and Jenson and those people saw those shot marks?

A. Afterwards when they went up to take entry of the provisions John told me——

(Objected to by counsel for the Government as hearsay.

Objection sustained. Exception.)

Q. Those marks were there, however. You know that?

A. Yes, sir.

Cross-examination by Gen. FREDERICHS:

Q. You testified in this case once before?

A. Yes, sir; I did.

211 Q. When you got to San Francisco, had the contract for provisions already been made?

A. No, sir; not for provisions.

Q. What had been contracted for?

A. They had made a contract for the two boats with a gentleman by the name of Neese, and there was a contract made with this—the name of the company I now disremember; a hundred dollars put down as a forfeit to bind the contract——

Q. Had Hurlin and Sheffler put up a bonus?

A. Hurlin put up a hundred dollars to bind the contract with the company.

Q. What had they put up on the boats; how much?

A. They paid the bill in full.

Q. Which bill?

A. The bill for the two boats; you see this big boat, Hurlin said, cost a hundred dollars, and it cost a hundred and fifty dollars for the hull of the small boat.

Q. They had, then, bought and paid for the boats when you got there, as far as you know?

A. They put up a contract any how; the exact terms I do not know.

Q. But the bill was subsequently paid in full?

A. Yes, sir; they settled up that part of that bill.

Q. Then you went around and bought up the provisions?

A. Hurlin went over to all of the grocery stores in town and got an itemized price list of provisions.

Q. Did he bring that to you?

A. Yes, sir; and he says Smith's Cash Store is the cheapest place.

Q. Did he give this list to you?

A. He gave it to Patterson, and Patterson showed it to me.

Q. What did you do with the list; get the provisions from that?

A. Got the goods at Smith's Cash Store.

Q. Who went over there to get the goods?

212 A. I, Patterson, and the woman; Hurlin brought us over and introduced Patters'.

Q. Did you look over the goods yourself?

A. Yes, sir.

Q. Did you compare them with this list?

A. Yes, sir.

Q. Did they make any discount to you from the amount taken from the price list?

A. Not a cent.

Q. How much money did you pay to Smith's Cash Store?

A. I think five hundred dollars or something over.

Q. Was that all the goods you purchased?

A. No, sir.

Q. Where did you purchase the other provisions, and in what amount?

A. Yes; we got nearly all the provisions——

Q. Well, what other provisions did you get?

A. O, we got a small bill at another place; twelve or fourteen dollars.

Q. Aside from some small items, you got most of the provisions at Smith's Cash Store, didn't you?

A. Yes, sir.

Q. Did you pay the money?

A. Patterson put up and I put up.

Q. How much was the weight of all of these goods?

A. Well, the largest amount of goods we had—that is, as far as weight is concerned, was forty sacks of flour put up in canvass sacks; we had several tons of provisions.

Q. They were all stored in the barge when you started?

A. Yes, sir; I and the man stood there and stored every pound of it while the others were carrying them down.

Q. Did they take up all the space of the barge?

213 A. Just what I mentioned before, from those points up level with the top of the boat.

Q. And these sleeping bags were spread on top of the stores and boxes, and so on?

A. We put the boxes underneath and the provisions on top to keep them from getting damp in the bottom of the boat.

Q. And on top were the bunks?

A. Yes, sir; right on top of those sacks.

Q. You have placed the berths here right down against this water barrel [referring to Bird's diagram]; what is this space here between this berth and here?

A. You see we made a bunk right in here and we had this box back there like this to keep the wind off. You see the sleeping bags was made with covers and Patterson used to tie them to the canvass like.

Q. Well, what was this space here?

A. It came right up to the front of the berth there.

Q. Your berth came up flush here, did it?

A. Pretty near it.

Q. Why did you leave the space there?

A. I'm not such a good draughtsman to make it exact in every particular.

Q. What was the length of these berths?

A. I think about eight feet long, or nine feet.

Q. What was the distance from the corner of your berth, this bunk here, to the place down here where these provisions were?

A. Well, measure this bunk at nine feet and that would be two feet; that would be ten or eleven feet.

Q. Where did you say you stood when you fired?

A. Right in here.

Q. Where was Hurlin?

A. Over here.

214 Q. What distance was that from you?

A. Well, I should judge it must have been twelve or fourteen feet; somewheres around there.

Q. Now, you say there had been no difficulty at all between the time you arrived there and commenced to build this cabin until two or three days before this affair?

A. No, sir.

Q. You say Patterson was a little ugly about the falling of a tree the wrong way?

A. Well, they sawed these trees and they couldn't get them to fall the right way all the time. I says, "Let me show you how to fall them trees;" and I forget whether it was Sheffler on the other end of the saw or Hurlin, and we intended to throw it up the bank, but it fell the opposite way.

Q. Was Patterson mad at you for that?

A. No, sir; when we came to push it up the logs was very big, some of them three feet at the butt, and it was too heavy.

Q. Now, you never had an angry word up to this time, did you?

A. O, we had jawing, such as men that go up that river always have; just jawing.

Q. What do you call jawing—calling them a son of a bitch?

A. No, sir; I don't use no such word as that; we don't use that in the South.

Q. Didn't you call either of the men that name?

A. No, sir; I didn't, for I knew they wouldn't have stood for it.

Q. You never met Hurlin or Patterson but a month or so before you left New Orleans, did you?

A. I got acquainted with them in the month of February; me and Patterson was friends practically, and I met the other gentleman later.

Q. Now, you say up to the time you had your breakfast there that fatal morning, and you was arguing upon where you was to get

215 your money back and how these goods were to be divided, you never had one word of trouble?

A. No, sir.

Q. Nor dispute?

A. No, sir.

Q. How long had you known these men intended to go away?

A. They never notified me till the evening of the 24th.

Q. You said you told them that you wouldn't object to letting Sheffler go if you knew where they were going?

A. I wanted them to stay and help finish the cabin, of course.

Q. They stayed?

A. Yes, sir.

Q. Didn't they say they would be willing to stay and help you; that you had enough to do to take care of the woman?

A. They did not.

Q. But they wouldn't tell you where they were going?

A. They would not.

Q. Did they state any reason for declining to tell you?

A. No, sir.

Q. Did they say they proposed to take both boats?

A. Yes, sir; that they would take the big boat to keep provisions in, and the small boat to travel around with.

Q. And were going to leave you without any boat at all?

A. Yes, sir.

Q. Did you remonstrate with them and tell them you wouldn't let them take the boats?

A. No, sir; I told them the boats wouldn't go until I got the roof on the cabin.

Q. Now, there was no quarrel or dispute, and you were sitting and talking in a friendly way about how the property ought to be divided, and there was some question of how much Sheffler was indebted to you?

A. Yes, sir.

216 Q. You figured up that it was so much, and they figured it out and found it wasn't quite so much?

A. No, sir; he was ringing in board and bills of expenses there, and figured it out that he didn't owe anything.

Q. Who was?

A. Hurlin was.

Q. Hurlin was doing the talking with reference to Sheffler, was he?

A. Yes, sir; all the talking in the settlement.

Q. Patterson wasn't saying anything about the settlement?

A. No, sir.

Q. All at once you said to these people, "You're a lot of God damned thieves?"

A. No, sir; cut-throats.

Q. You said thieves, didn't you?

A. They're cut-throats.

Q. And then Patterson says, for the first time, "You're a God damned liar?"

A. Yes, sir.

Q. And up to that time he hadn't been taking part in the conversation?

A. Yes, sir; he said in the beginning they would divide the provisions to suit themselves; that Thompkins didn't have a God damned thing to do with it.

Q. It wasn't Hurlin that said that?

A. No, sir; he chipped in when we was settling up the bills.

Q. And that was the time you said, "You're a lot of God damned thieves," or cut-throats; and up to that time Patterson hadn't been saying anything in that conversation?

A. No, sir.

Q. You also said you told them, "You made ten per cent on the purchase of those goods?"

A. Sheffler told me when they were adding it up on the boat that they made ten per cent on them.

217 Q. And so Patterson took that up, did he?

A. Yes, sir.

Q. And said you was a God damned liar?

A. Yes, sir.

Q. Patterson hadn't bought the provisions, had he?

A. Yes, sir; he did.

Q. You went along, and put up your share for them at the time they were purchased?

A. Yes, sir.

Q. Hurlin had brought the price list to you?

A. Yes, sir.

Q. You and Patterson examined them and went down to Smith's and bought them?

A. Yes, sir.

Q. And paid for them?

A. Yes, sir.

Q. How long was that after you landed in San Francisco?

A. We stood there for day after day watching them sacking the goods, and Hurlin said he couldn't hurry them.

Q. How long after you got to San Francisco was it, sir, that you and Patterson went and paid for those goods?

A. About four days afterwards.

Q. And Patterson arrived in San Francisco with you?

A. Yes, sir.

Q. And yet when you accused these people of making ten per cent on the goods, Patterson was the one to take it up and call you a damned liar?

A. Yes, sir.

Q. And you struck him?

A. He struck me first.

Q. Patterson called you a God damned liar and then hit you?

A. He jumped up and said I was a God damned liar, and cracked me in the ribs.

218 Q. And you caught him one in the eye, did you?

A. Yes, sir.

Q. And gave him a black eye, too, did you?

A. Yes, sir.

Q. Did you swear to that in the last trial of this case?

A. I believe I did.

Q. You believe you did! Didn't you say at the last trial that you struck him in the head with your fist?

A. No, sir; I told you I struck him in the eye and gave him a black eye—that's what I told you.

Q. Didn't you say that Patterson struck you in the head with his fist?

A. No, sir.

Q. All right, sir. Now, you knocked Patterson down?

A. Yes, sir.

Q. You was watching him all the time, were you?
A. Certainly; he was watching me and I him.
Q. And you was watching Hurlin, too, wasn't you?
A. Yes, sir; indeed I was.
Q. How near was Hurlin to Patterson at the time you struck Patterson?
A. Closer than I am to the judge. He—they was sitting right close together, and he jumped up.
Q. And you were looking at them; now, how far was it to where your gun was?
A. My gun was in back behind the water barrel.
Q. How far?
A. About five feet.
Q. What did you have to climb over to get to it?
A. Just had to jump right down to it.
Q. You were watching these men at the time?
A. Yes, sir.
Q. And yet you never made a move, sir, for that gun until Mrs. Strong hollered out, "Look out, Homer, they're getting their guns;" is that true?
A. That is true.
Q. And you didn't see them doing anything yourself?
A. I see Hurlin running for his gun, digging for his gun.
Q. What necessity was there for Mrs. Strong to holler that to you?
A. Why, she seen Hurlin getting his gun, I suppose.
Q. Didn't you see him?
A. No, sir; I kept my eye on Patterson.
Q. What was he doing?
A. He was getting up.
Q. And when she said that, you dropped Patterson, and went after Hurlin?
A. I seen Hurlin coming up with his gun out of his sleeping bag; one end of it was caught——
Q. Did you see him coming, or just getting up?
A. Pulling it up—getting up with his gun.
Q. You say he kept that in a canvas case?
A. Yes, sir.
Q. Had he gotten it out of the case when you shot him?
A. It was out that morning.
Q. When you said it was caught in the case, what did you mean?
A. No, sir; in the sleeping bag; the end of the gun was caught in the sleeping bag.
Q. You had time to take note of that, did you?
A. I seen what he was doing.
Q. How did he have the gun, do you say?
A. He had hold of one end of it this way, coming up with it.
Q. With the muzzle caught in the sleeping bag?
A. No, sir; the stock end of it.
Q. How was he standing; with his left side or right side toward you?
A. With his left side.

Q. And raising the gun in this manner?
A. Yes, sir.
Q. Was the gun down this way?
A. No; he was reaching like that—must have been about that high.
Q. Raising the sleeping bag and the whole thing with it?
A. The end of the sleeping bag was caught on the end of the gun.
Q. How high from the floor did you say?
A. About that high [indicating].
Q. Had he said anything?
A. Not a word.
Q. Had Patterson said anything?
A. No, sir.
Q. Did you have hold of your gun before you saw him raising up?
A. No, sir; I grabbed my gun when I seen him coming up.
Q. Did he have his gun, and raising it up, before you started for yours?
A. No; as soon as I see him getting his gun, I jumped for mine, and seen him coming up with his gun.
Q. You wasn't watching Patterson during all this time, were you?
A. No, sir; when I seen Hurlin getting his gun, I went for him.
Q. Yet he had never said a word?
A. No, sir.
Q. Nor you to him?
A. No, sir.
Q. Why didn't you tell him to drop that gun?
A. I wasn't going to take no chances.
Q. And he hadn't got his gun out of the sleeping bag yet?
A. No; he was trying to get it up.
Q. And without a word, sir, without telling him to drop his gun, and without any warnings or caution, you fired and killed him?
A. Yes, sir; I did. I was put on my guard before that.
221 Q. Then you turned; you saw he was done for first, did you?
A. Yes, sir.
Q. And then you turned to look after Patterson?
A. Yes, sir.
Q. What was Patterson doing by that time?
A. He was breaking for the gun in the bow of the boat.
Q. How do you know he was?
A. He went that way.
Q. Went to where it was, did he?
A. Yes, sir.
Q. How far was he from where you claim his gun was?
A. About two feet from the gun.
Q. Standing up?
A. No, sir; in a stooping position.
Q. That's how you caught him in the shoulder, isn't it?
A. Yes, sir.
Q. He was in a stooping position; stooping like that and grabbing for his gun, was he?
A. When he jumped for his gun he couldn't be standing straight.
Q. Did you see the gun?
A. Yes, sir.

Q. At that instant?
A. Yes, sir; I did.
Q. Just two feet from him?
A. Yes, sir.
Q. Did you speak to Patterson?
A. No, sir; never said a word to him.
Q. Didn't you tell him to stop?
A. No, sir.
Q. Just fired at him?
A. Yes, sir.
Q. Tried to kill him, too, didn't you?
222 A. Not necessarily.
(Objected to by counsel for defendant as improper.)
Q. Now, you say you didn't fire three shots?
A. No, sir; I didn't.
Q. Patterson then jumped overboard, did he?
A. No, sir; he did not.
Q. He fell overboard?
A. No.
Q. Didn't you state a while ago that he fell overboard?
A. No, sir; I did not. He fell out of the bow of the boat. When he jumped he fell over here on the beach.
Q. Where did you say he fell?
A. On the land. You see half this boat was on the shore.
Q. Did he fall on the right side or the left side of the boat?
A. On this side.
Q. That's the right side?
A. Yes, sir.
Q. That's the side next to the water, isn't it?
A. Yes, sir; but here's the water back here; here's the shore, here's the mountains, and here's the river.
Q. Was this boat all on dry land?
A. No, sir; only half. That's what they made those rollers for, for to get the boat off. If they had remained——
Q. Now, you say Sheffler—after you got around where Patterson was lying on the ground, Patterson says—what was it you say he said at the time—"You did right to kill the Dutch son of a bitch?"
A. No, sir; Sheffler says they tried to get him into the trouble, and "I'm glad the son of a bitch is dead. He's the whole cause of this." And Naomi says, "It would deserve you right if Homer had killed you too"——
Q. She said that to who—Patterson?
223 A. Yes, sir.
Q. And then what followed with reference to Sheffler?
A. I says to Sheffler, "You're as deep in the mud as they are;" he threw himself down on his knees and swore to God he hadn't a thing to do with it.
Q. Did you testify to those facts on the trial before?
A. No, sir.
Q. Why not?
A. Because, sir, I was in no fit condition to tell anything. I had

been dragged from pillar to post, and there was my wife crying before me in open court, and every man of you with your hands against me; I didn't have one friend to look to and I was in there with a dozen or thirteen other prisoners and no care taken of me; if it hadn't been for the kindness of my lawyers I would have been a crazy man to-day, sir.

Q. Did you testify to this I have called your attention to before on the witness stand, sir?

A. No, sir; I was in no fit condition to testify to anything.

Q. You testified to a whole lot of things at that time, didn't you?

A. I was brought to St. Michaels on the 16th day of——

(By Gen. FREDERICHS. If the court please, I insist that this witness answer the questions asked him. He's going on here with a speech to the jury——)

Q. You were on the witness stand before at the trial of this case as a witness in your own behalf?

A. Yes, sir.

Q. And at that trial you testified to what you claimed to be the facts of the case?

A. To the best of my ability, sir; I was as much a crazy man as I could be and not be in the asylum, and I'm not over the effects of it yet.

224 Q. You're not so crazy, then, as you were at that time?

A. Pretty near it; under such treatment as I have received in this country anybody would go crazy.

Q. You didn't testify at that time that Sheffler said about Hurlin what you now claim he did?

A. No, sir; because I had a whole lot of Germans on the jury and every other word was Dutch son of a bitch, and when I made a statement on that stand they would turn their backs on me and never listen to a word.

Q. You just supposed that, didn't you?

A. I was in no fit condition, sir, to make a statement on that stand at the time.

Q. Now you say the reason you didn't make that statement was because there was a lot of Dutchmen on the jury. Is that right?

A. I didn't tell you one-half what I knew on that stand, and I said I didn't know this or that simply because I knew they wouldn't listen to a word I said with that kind of a jury.

Q. Answer my question, sir. Is that the reason you did not testify to these things on the former examination?

A. I didn't think—in fact, I don't think it came in my mind at the time.

Q. Didn't come in your mind at the time?

A. No, sir.

Q. Now that's the real reason, then, that you didn't testify as you do now; it didn't come in your mind?

A. I was in no fit condition, I tell you, to take the stand at that time; there's a good many things I couldn't remember at that trial, and now, if you'll just allow me, I'll tell you why and you'll see that I'm about halfway right anyhow, if you'll give me half a chance——

By the COURT. Mr. Bird, you used language a while ago about
225 the former jury in this case that no man should use in a court of justice; you will be careful and not to do it again. Now answer the questions asked you.

A. Judge, I'm not in any condition to make a statement. The way I've been treated in this case——

By Mr. MALONY. Keep cool, Mr. Bird; we understand that.

Q. Now, you say you took Patterson your best in the ribs, do you?

A. No, sir; I said I took Patterson in the eye.

Q. Well, you say Patterson took you in the head?

A. No, sir; I said he caught me one in the ribs.

Q. Didn't you testify this on your former examination: Hurlin and Bob they said they would divide the provisions to suit themselves. I says you won't divide them. I says you want to beat me out of the money I put up on them, and Patterson says you're a damned liar and struck me in the head. Did you testify to that?

A. Perhaps I did and perhaps I didn't. I was in no fit condition to make a statement, and I will explain to you why——

Q. You don't need to explain any more; do that for your lawyers. Now, you say, whose shotgun was it that got split across?

A. Well, I don't know which one it was. It must have been Hurlin's, because it was under his bag. This gun you see there was one belonging to Patterson and the other one to this man Hurlin, and Sheffler never had a gun of his own. He sold one of them at the trading post after the crime was committed.

Q. Now, isn't it a matter of fact that this gun—one of these guns—had been broken in trying to pry off a piece of ice?

A. No, sir; and I'll explain to you why. You see, we built this cabin into the mountain there, and there was a stream came down where we used to get water, and when it froze we had a pick to pick it up with; you can't pick that ice six inches or a foot thick with a gun.

226 Q. Then it didn't occur the way Sheffler says it did?

A. No, sir; it didn't; just as sure as I'm sitting on this stand. And furthermore, if I shot those men in cold blood may God take my dead carcass off this stand this minute.

Q. Well, I'll ask you this: "Question. What did you do immediately after you fired at Hurlin? Answer. I shot Patterson. Question. What was your object in shooting Patterson? Answer. I thought he was making for his gun." Did you testify to that on the last trial?

A. Yes, sir.

Q. And on that thought you shot him.

A. Well, the woman told me the night before, and I thought they were intending to do me up.

Q. You say now, at the time that you shot Patterson he was in a stooping position?

A. Yes, sir.

Q. I'll ask you if you didn't testify on the last trial: "Question. In what position was Patterson at the time you fired? Answer. He was going out."

A. I may have, and I may not.

Q. Did you or did you not, sir.

A. I couldn't tell you. I was in no fit condition to testify.

Q. You was a good deal nearer in point of time to all these occurrences, and your memory was fresher on these things.

A. If you will give me full leave to explain then you will see just why.

Q. I don't want any more explanations. We have had enough of them already——

A. It was this way; while we was over there——

By Mr. MALONY. Never mind, till the attorney asks you about those things.

227 Q. Now, you say that you wanted to give yourself up, and these people persuaded you out of it. Did they prevent you from giving yourself up if you had wanted to?

A. They begged me not to.

Q. All three of them?

A. Yes, sir; they did.

Q. You were very friendly, I suppose, you and Sheffler and Mrs. Strong and Patterson, after this tragedy, were you—all living in peace and harmony as good friends?

A. Yes, sir.

Q. And as your friends, they begged you not to give yourself up?

A. I don't know what their idea was.

Q. And you yielded?

A. Yes, sir; I listened to them like a fool.

Q. How long did you live there after that?

(Objected to by counsel for defendant as incompetent, irrelevant, and immaterial.

Objection overruled. Exception.)

A. From the 27th day of September to the 6th day of April.

Q. And they never told on you during that time?

A. No, sir; they had all the opportunity they wanted; Hendricks was there one day while I and Sheffler was to the island hunting and bought some provisions——

Q. Well, they had opportunity, did they?

A. They were together.

Q. Well, you also had opportunity to give yourself up?

A. If we had been arrested for murder and I tried as principal and them as accessories I would have been a free man to-day. And there's another thing I would like to explain——

Q. Never mind. Now, you say you was let out of jail at St. Michaels—is that true?

A. Yes, sir; and very well he knows it (referring to Vawter).

228 Q. By a guard?

A. Yes, sir.

Q. Was Mr. Vawter a party to that transaction?

A. No, sir.

Q. Well, how did he know about it then? But you say one of Vawter's men let you out?

A. Yes, sir.

Q. Did you buy him?

A. No, sir; because he robbed me out of every dollar I ever had——

Q. The man just voluntarily let you out, did he?
A. Yes, sir.
Q. What did you saw the hole in the floor for then?
A. I never sawed it. You can just take these two knives, you jury men, and examine them. Don't that show that this is nothing but perjury?
Q. Was there anything said about fixing the thing up so you could escape from jail out there?
A. No, sir; this man (referring to Vawter) got on the stand at the other trial and swore I crawled through a hole ten by seventeen inches, and he finally got somebody to measure it and found his story wouldn't go, and now he changes it.
Q. What was the name of the man that let you out of jail?
A. That's my business; I won't tell you. If the court will guarantee that you won't prosecute him, I will tell who he was. Mr. Vawter knows who he was.
Q. Now, you say, Mr. Patterson, after he was shot, went out and chopped wood?
A. Yes, sir; we cut about forty cords of wood together.
Q. And Patterson—who cut forty cords of wood?
A. Patterson and Sheffler.
Q. After he had been shot?
A. Yes, sir.
229 How long after he was shot?
A. About two months afterwards.
Q. And you got forty cords chopped, you say?
A. Yes, sir; but he was afterwards taken down with the scurvy, both him and Jim.
Q. How long did you chop wood?
A. About two months, or a month and a half.
Q. Pretty good chopping, wasn't it?
A. I and Sheffler did the sawing, and the woman helped to trim the trees off.
Q. Mrs. Strong and Sheffler were present then?
A. Yes, sir; she will tell you if she is willing to tell the truth; but she won't do that.

Redirect examination by Mr. MALONY:

Did any shots strike Patterson in the face?
A. Not a one, sir.
Q. That's all.
A. I would like to explain just one thing, your honor, before I leave the stand, about this marshal here——

Recross-examination by Gen. FREDERICHS:

Never mind about your explanations——
By the COURT. Mr. Bird, you have counsel here to defend you; they are better judges of what is best for you than you are yourself.
A. It's only this, your honor——

Redirect examination by Mr. MALONY:

You say no shots took effect in his face?
230 A. No, sir; and I'll stake my whole case on it, if that isn't

the truth. I can prove that by all those men up there if you will give me a chance to get them here.

Q. The only shots that took effect were those in the shoulder?

A. Yes, sir; I am willing to be held here until you can get a communication to Anvik and get my witnesses to prove that by.

231 Rev. —— CONDIT, being first duly sworn on behalf of the defendant, testified as follows:

On direct examination by Mr. COBB:

Mr. Condit, where do you reside?

A. In Juneau.

Q. What is your occupation?

A. I'm a minister.

Q. State to the jury, Mr. Condit, whether or not you have had much experience with shotguns, in observing the effect of shots at various ranges, the extent and nature of their penetration at close range, and as to whether or not they will scatter, &c.?

(Objected to by counsel for the Government as immaterial.

Objection overruled. Exception.)

A. I have had some experience; yes.

Q. State what has been the extent of your experience.

A. Well, I have used a shotgun more or less for ten or fifteen years.

Q. Have you observed the extent to which shot will scatter, say what is known as BB shot, at various distances from the muzzle?

A. Yes, sir.

Q. Now, Mr. Condit, state how a charge of BB shot fired from a breech-loading number twelve shotgun—the extent to which they will scatter at a distance of four to six feet.

(Objected to by counsel for the Government as incompetent, irrelevant, and immaterial, the witness not having shown himself qualified to answer the question even if it was material.

232 By the COURT. The question is not one of a scientific nature altogether, although based upon scientific examination. The distance at which shot will spread depends almost entirely upon the loading, partly upon the gun itself. No two guns are just the same; in fact, are generally not the same. The different powder used makes a difference; the different manner in which the shot are driven into the cartridge makes a difference; and without any knowledge as to any of these things, the answer of the witness would be of very little if of any value. The witness may answer, however, and the question of weight be left to the jury.)

Q. Just state the extent to which they will scatter, Mr. Condit.

A. The shot would spread very little at that distance, as far as my experience goes. It would have almost the same effect a bullet would have, only that the opening in the object would be larger.

Q. Now, Mr. Condit, if a wound should be made on a human body by BB shot, and extending from about the lower point of the shoulder blade and up the shoulder in this direction and through the muscles of the shoulder and neck—if a wound were inflicted by a double-barreled shotgun loaded with BB shot, of that nature, especially if the shot had scattered and lacerated the flesh in two or three different places, what

would the distance be likely to have been, from four to six feet or greater?

A. I should think it would be greater, to make such a wound as that.

Q. Now, if a man had been shot in the shoulder with a shotgun charged with BB shot, at a distance of from four to six feet, what sort of a wound would it make?

(Objected to on the ground they have not shown Mr. Condit to be an expert. I don't suppose he ever shot a man, anyhow.

Objection sustained.)

233 Q. Now stand up, Mr. Condit—back by the window there. Now, say a man was standing in your position, with his feet on the same relative level, and another man was sitting in my position [illustrating], and just as he was in the act of rising like this from his seat you should shoot him in the shoulder with a shotgun, to what extent would the shot scatter at that distance?

A. Well, my judgment is the shot would scatter very little in that distance.

Q. Well, tell to the jury about whether it would go in a solid body or otherwise?

A. I should think it would go in a solid body. Of course, you want my opinion as to the effect.

Q. Yes; if you have had occasion to know.

By the COURT. No; he can't give his opinion simply on a question of that kind.

(Exception.)

By Mr. COBB. We expect to show by this witness that he has had occasion to observe the effects of a shot at that distance and under practically those circumstances—not on a man, but other objects.

By the COURT. But you can't show it that way—by getting this man's opinion on the matter.

Q. Now, have you had occasion to observe the extent of the penetration of shot, say BB shot, at very close range, say at from four to five or six feet?

A. I do not know that I ever observed the effect of BB shot at such short range—in fact I couldn't say anything as to the size of the shot, but at the range you speak of a load of shot will not spread, at four to six feet.

Q. Have you ever observed the extent and nature of their penetration, the force, the power with which they go?

234 A. Yes.

Q. Well, now, if a man is shot through the head with a double-barreled ordinary shotgun by a man standing at a distance of four to six feet, will the head stop the shot or will it go right on through?

(Objected to by counsel for the Government as irrelevant, incompetent, and immaterial.

Objection sustained.

Exception.)

Cross-examination by Gen. FREIDERICHS:

Mr. Condit, shotguns are about as variable and uncertain in their operation as almost anything else you can think of, are they not? As a

general proposition, different kinds and characters of guns—they differ altogether as to what effect they will have, even at the same distance?

A. Yes; there is a difference.

Q. And not everything depends upon the character of the gun itself, but also on the kind of powder, the manner in which the gun is loaded—don't all those things enter into the proposition?

A. Yes, sir; they all enter in.

Q. And one gun might put a shot across this room and into a man or object almost like a rifle ball, and another gun might at the same distance scatter a great deal?

By the COURT. I think that is perhaps going outside of cross-examination, General.

Redirect examination by Mr. COBB:

235 Have you ever seen a shotgun that would scatter at a distance of four to five or six feet to amount to anything at all?

A. No, sir; I have never seen one of that character.

By the COURT. Have you ever shot one to see what amount it would scatter at a distance of four to six feet?

A. Four to six feet?

Q. Yes, sir; did you ever make that kind of an experiment?

A. Well; I don't remember that I ever did; I wouldn't say to a certainty that I ever had done so.

236 A. K. DELANEY, a witness duly called for and on behalf of the defendant, being first duly sworn, on his oath testified as follows on

Direct examination by Mr. COBB:

Q. State your name.

A. Arthur K. Delaney.

Q. What is your occupation?

A. Lawyer by profession.

Q. Judge Delaney, have you ever had any experience with shotguns in noticing the amount which shot discharged from a gun will spread at various ranges; and if so, state to the court and jury the amount of experience you have had in that line?

A. I commenced shooting an old-fashioned muzzle-loader when I was a boy, in about 1858. I think it was in 1870, after the war, I commenced shooting a central-fire breechloader for fowling purposes—prairie chickens, snipe, woodchuck, and duck—shooting down around my old home, and that continued every fall during the open season—from the first of every September until the time it froze up in November; out almost every Saturday, and sometimes oftener, with dog and gun until the fall of 1886.

Q. Now, in the course of your experience in hunting, shooting, and so on, Judge, state whether or not you have observed the extent to which shot will spread at various ranges, including very short range.

A. Well, my observation and experience has been rather more extensive at the long ranges, although I have had some experience and observation as to the effect of shot delivered at short range.

Q. Has your experience in that line been such that you can give a reasonably correct answer as to the effect of shotgun shots at close range?

237 A. I think I could.

Q. Now, Judge Delaney, state to the jury——

By the COURT. Judge Delaney, did you ever take your gun and experiment upon various distances to determine with accuracy to what extent shot scatters at various distances?

A. Yes, sir; I have in this way: The manner which we had of testing guns as to their penetration and scatter, the rule with us was forty yards, with a thirty-inch ring or circular target thirty inches in diameter. I have experimented on all the way down to twelve or fifteen feet to see the effect of shots from different guns, and one other thing I want to explain; there is a difference in guns. It is understood by almost every sportsman that there is a difference between a plain, straight barrel and the choke bore. The choke bore will deliver with a great deal more penetration, and it depends a little, too, on the powder, and the charge also; the more powder you use with a certain charge of shot, the more it will scatter, and vice versa to a certain extent.

Q. Now, an ordinary charge from a shotgun, these bought shells, to what extent will that scatter at a distance of from four to six feet?

(Objected to on the ground that the witness hasn't shown himself qualified.

By the COURT. He may state if he can answer it.)

238 A. Well, I can state from experience and give my opinion. I have seen birds killed at that range where a greenhorn would up and shoot at a bird before it got out of the grass, and I have seen the effect of shots in a fence board at short range.

Q. Tell the jury how the shot would strike; what the effect would be as to its scattering.

(Objected to as immaterial.

Objection overruled.)

Q. A shotgun with a plain bore, loaded with four drachms of old-fashioned black powder manufactured by Schult & Hazard when I used to do my shooting, and a charge of an ounce and an eighth of shot, the muzzle of the gun—you say six feet from the object?

Q. A man standing from four to six feet.

A. Well, there would be quite a difference in that two feet I want you to understand. With the muzzle of the gun at a range of six feet from the target, I guess the bulk of the charge could be covered by a six-inch circle—there would be some scatter in the shot; if you put it at four feet the circle would be still smaller.

Q. It would go practically as a solid body, wouldn't it?

A. Pretty near it, Cobb. I couldn't say that it would be a solid body, though.

Cross-examination by Gen. FREDERICHS:

Q. You never shot a man at a distance of four to six feet?

A. No, sir; and a very few game birds at a range so close.

Q. Now, as to what one shotgun will do, and what another one will do under different circumstances, it depends a great deal. In the first place, you can take the same shotgun; it will vary as to the scatter of

239 the shot and the penetration according to the size of the charge, the kind of powder, and the manner in which the charges of loaded, will it not?

A. Yes, sir; if you increase the powder and decrease the shot, or vice versa, you will get a quite different result.

Q. Everything depends upon the character as to what different guns at the same range will do, upon whether it is the same kind of powder, and the same charge, as to the different results?

A. Those are elements that enter into it?

Q. Now you say at a distance of from four to six feet, the charge, *the charge*, ordinary charge, would be encompassed within a space six inches in diameter?

A. Yes, sir; on the hypothesis I stated—four drachms of powder and an ounce and an eighth of shot.

Q. And there might be a few scattering shot?

A. Yes, sir; there might be a few outside.

Q. And the difference between the four feet and the six feet you say would make some difference as to the scatter?

A. It would decrease in proportion to the less distance.

240 JUNEAU, ALASKA, *December 24th—10 a. m.*

HOMER BIRD, the defendant, being recalled, testified in his own behalf, as follows:

On direct examination by Mr. COBB:

Mr. Bird, in your testimony last evening the court understood you to refer in your testimony to some of the jurors formerly sitting on this case in an insulting manner. I want you to explain what you said, something about every other one on the jury being a German, and their witnesses, as I understood you to say, testifying that you called Sheffler and Hurlin Dutch sons of bitches—just explain that?

A. I didn't call the jury no Dutch sons of bitches, nor neither did I Hurlin. I stated that Sheffler got onto the stand and before that jury swore that I called Hurlin and Sheffler Dutch sons of bitches behind their backs, and that every other word on the stand was Dutch sons of bitches.

Q. You did not then refer to the former jury?

A. No, sir; I had no reason to call them that.

Q. Now state whether or not this is the testimony to which you referred; I read from the record in the former case——

(Counsel for the Government objects to any further explanation of that matter as immaterial.

Objection sustained.

Exception.)

Cross-examination by Gen. FREDERICHS:

I desire to cross-examine the witness on one matter which I omitted last evening and to recall him for that purpose.

The COURT. He may be recalled, and for further examination
241 in chief as well.

You stated yesterday that some months after Patterson had been shot, and that—that he got out and helped you cut a number of cords of wood, for a period of two months?

A. Yes, sir; he did.

Q. Did you testify to that——

(This is objected to by counsel for defendant as repetition.
Objection sustained.)

Q. Did you testify to that fact when you was on the witness stand in the former trial?

(Objected to as irrelevant and immaterial.
Objection overruled. Exception.)

A. I don't know.

Q. You don't know whether you did or not?

A. No, sir; I couldn't say positively, because as I told you before I was in no fit condition to make a statement at that time at all.

242 H. J. GURR, a witness duly called on behalf of the defendant, and being first duly sworn, testified as follows:

On direct examination by Mr. COBB:

State your name.

A. Reverend Henry J. Gurr.

Q. What is your occupation?

A. A clegyman of the Episcopal Church.

Q. Mr. Gurr, state to the jury whether in your lifetime you have had any experience in handling shotguns, and if so, the extent of your experience and observation with reference to the extent to which shot will scatter discharged from a gun at various ranges—what you know.

A. From the time that I was a little boy, almost, we had in our possession in England and old gun called and known to be the "Old Brown Bess." It was the first gun ever made of the kind, a flint-lock gun, the size of the bore—it was a rifle at the time or used as a rifle, for rifling was not in vogue then—the bore was what would be to-day a sixteen bore. It came into our possession as a family relic of the old days in England, and we used that as a shotgun in the basement of our house, and frequently my brothers and I have used it there for target practice at different ranges.

Q. What has been your experience since then with ordinary breech-loading shotguns?

A. I have used them repeatedly and constantly from then down to this present day.

Q. Guns of practically all makes?

A. Yes, sir; and the three sizes chiefly eight, ten, and twelve bores.

Q. From your experience and observation with them, do you
243 know to what extent shot under ordinary circumstances will scatter?

A. I think the most exact statement I could make as to that would be the criterion which comes into line with my judgment and experience in that regard.

Q. Before stating that, state whether you have had sufficient experience and observation upon which to base a reasonably accurate judgment.

A. I think I have.

Q. Now, to what extent will BB, or what is commonly called "buckshot," scatter at a distance of four to six feet, from the muzzle of the gun, we will say?

By the COURT. Before asking that question, you better ask the witness

as to the various conditions in the use of the gun, the charge, the powder, the difference in guns, and so forth.

Q. State whether or not at a distance of four to six feet, what difference, or about what difference, there would be in the extent to which shot will scatter fired from different guns, of different bores, and different charges, and so on.

A. The variation would be very slight under any and all circumstances; but there would be a slight variation with the different sized shot. For instance, there is what they call a "chambering" of shot in the barrel of a gun. If the shot fits exactly, without being loose or tight, and without touching or pressing each other, and take a barrel with a heavy cylinder, the shot will be thrown almost perfectly, as perfectly as shot can be thrown. The less the shot comes to this perfection in the manner of their loading, the less perfect will be the circle in which they are thrown.

Q. You say at that distance though, under any conditions, with ordinary barrels and shot and powder, the variation would be very small?

244 A. So small, indeed, that it would be hardly noticeable, unless there was something to deflect the shot.

Q. Now state to the court and jury about the extent to which an ordinary charge will scatter at the distance mentioned.

By the COURT. First, what do you say as to the different charges of powder, as to whether that would affect the question?

A. The different charges of shot or powder will make a difference to be sure, but more in the penetration than the pattern of the resulting charge, but the pattern will still vary slightly. To fire a gun loaded as I have first described, you will ordinarily, as I say, get an even pattern and even penetration; but a larger or smaller amount of powder will affect it the same as will the amount of the shot, and cause it to scatter at a greater or less extent. For instance, if you should use double the amount of powder behind the same charge of shot it will scatter much more.

Q. Is that your experience?

A. Yes, it is.

By Mr. COBB. Now, have you made any experiments with different charges of powder and shot from a distance of six feet recently?

A. I have in my lifetime, and also recently.

Q. Examine that box now, Mr. Gurr (referring to dry-goods box previously produced, shot through from two different ways).

(Objected to by counsel for the Government, on the ground that it is improper; if he is testifying as an expert let him testify without an object lesson of this kind.)

By the COURT. This isn't a proper proceeding at all, gentlemen, and I don't know where you get your notions from; but you may proceed.

245 (Counsel for defendant except to the remarks of the court.)

By Mr. COBB. You have seen that box before?

A. I have.

Q. Tell the jury what this hole in the end of the box is?

A. It is made by three and a half drachms of smokeless powder with an ounce and an eighth of shot fired with a gun six or seven inches

shorter than shot guns are usually made; it scattered very much at six and a half feet from the muzzle of the gun, measured with a tape line.

Q. What is this hole here in the other end where the shot came out?

A. That is where it perforated both ends in passing through the entire box.

Q. Now, state what this hole is here in the side of the box.

A. That is a larger hole where the shot is more scattered.

Q. With what was that hole made?

A. Four and a half drachms of powder, or rather three-quarters of a drachm of powder more than the other shot, the same charge of shot, same gun, and with black powder.

Q. Now, from what distance was that fired?

A. Six and a half feet, exactly the same as the other.

Q. Did that one go clear through the box?

A. Yes, sir; and through the other side of the box.

Q. State whether or not you fired a charge of shot about that distance at the same time against any other mark.

A. As I went along, I picked up a block of wood that had a knot on it; I fired at the knot and struck about an inch below it, at a distance of five feet——

(Objected to as improper, incompetent, irrelevant, and immaterial. (After argument.)

The objection sustained.

Exception.)

246 Mr. Gurr, have you had any experience as a physician or surgeon?

A. Quite a little in one way or another; I also have brothers who are surgeons in England and in the United States.

Q. Have you ever made a study of medicine?

A. To a great extent, yes, sir; I frequented the hospitals for years, especially at ——, and had carte blanche there during the whole time.

Q. State if you have had occasion to observe the effect of gun-shot wounds.

A. I have, on one or two occasions.

Q. And have made a study of that subject besides.

A. Constantly.

Q. From your experience and knowledge in that line, can you say what would be the reasonable effect as to whether or not a charge of shot would go through a human head fired against it—the back of the head—from a distance of four to six feet, and state whether you can reasonably answer or give a reasonably correct opinion on that.

(Objected to by counsel for the Government on the ground that the witness has shown himself to be anything but an expert in that respect.

Objection sustained. Exception.)

Cross-examination by Gen. FREDERICHS:

You never fired a shot gun at a man's head six or eight, or even fifteen feet distant from him, did you Mr. Gurr, to see what the effect would be?

(Objected to as not proper cross-examination.

Objection overruled. Exception.)

A. I have seen the effect of shots at that distance from a man's head.

247 Q. You have?
A. Yes, sir.
Q. Don't you know there is a whole lot of difference between a shot striking any soft substance, like a man's head, clothing, or a human body, and a solid substance, like a piece of wood, as to the effect it will have?
A. There is a difference, of course.
Q. Don't you know that the same shotgun, out of different barrels, fired at the same time, might have a different effect, even on the same object?
A. So little as to make a very little difference in the effect, providing the barrels were the same.
Q. The same powder, and the same sized shot, and where everything is exactly the same, and the barrels exactly alike, there is a difference in the barrels even as to their accuracy?
A. Slightly; very little.
Q. Everything would depend—shotguns are as variable in their caprices as it is sometimes said women are; isn't that true?
A. Well, hardly, I think. According to my experience it is rather the other way. I only wish they were as true as some shotguns are.
Q. (By the COURT.) When did you make this experiment with the box, Mr. Gurr?
A. This morning.
Q. And the result is as you state it?
A. Yes, sir.
Q. You did it at the instance of Mr. Cobb, didn't you?
A. No, sir; I did not.
Q. Then at your own instance, for the purpose of coming here as a witness and testifying in this case?
A. No, sir; I surmised it. Mr. Cobb asked me a question which led me to do it. I was always of an analytical spirit.
Defendant rests.

248 C. L. VAWTER, recalled on the part of the Government in rebuttal, testified as follows:

By Mr. COBB. If the court please, we now offer this box in evidence, the box testified to by the witness Gurr.
By the COURT. You may just as well have the box in evidence now; it has been exhibited to the jury improperly, I believe.
(Objected to by counsel for the Government as incompetent, irrelevant, and immaterial.)
By the COURT. I think the objection, under the law, is well taken, but we might as well let it go in now.

Direct examination by Gen. FREDERICHS:

Mr. Vawter, did you see Robert Patterson after he was brought down from Anvik?
A. I did; I saw him at the coroner's inquest.
Q. Did you examine the face to see whether there were any shots in the face or not?
A. I did.
Q. Were there any?
A. There were.

Q. Where?

A. The front teeth were shot out, and a shot through his nose, and a shot hole through his shoulder; big hole in his shoulder.

Q. You heard the defendant, Bird, testify on the witness stand yesterday, in which he said you had robbed him of what money he had, did you?

A. I did no such thing; I turned it over to his attorneys, though.

(Objected to by counsel for defendant as improper examination.)

249 Objection overruled. Exception.)

Q. Give the facts with reference to any money transaction or any money you ever received on behalf of this man Bird, if you ever did receive any.

A. I never received it from Bird; I received it from Blaine.

Q. Was that all the money you ever received from him?

By the COURT. The witness has answered as far as it is proper for him to answer.

Cross-examination by Mr. MALONEY:

You say that Patterson died there?

A. Yes, sir.

Q. Isn't it a matter of fact that he had an ulceration on the side of the face, and that wasn't a shot mark?

A. I couldn't say, only I saw where a shot had gone in at.

Q. Don't you know, as a matter of fact, it wasn't a shot wound?

A. I'm quite sure it was a shot wound.

Q. You're not wholly sure of that, then?

A. It had every appearance of it.

Q. When was it you saw him?

A. At the time of the coroner's inquest.

Q. When?

A. In June.

Q. That was six or nine months afterwards?

A. O no, it wasn't over two months—a short time after he died, you know; as soon as they could get him there.

Q. When was the coroner's inquest?

A. In June.

Q. And Patterson was shot in September of the previous year?

A. Yes.

Q. You know that Patterson had the scurvy, don't you?

250 A. No, sir; I don't.

Q. Wasn't it generally known there at the time that he died with the scurvy?

A. It was not. He was taken care of at Anvik by the Rev. Chapman. He ought to have known about it.

Q. Now Mr. Vawter——

By the COURT. Gentlemen, all this testimony about Mr. Patterson should not be in here at all. If counsel had objected to it, the court would have ruled it out long ago. It is improper; and all of that testimony of Mr. Vawter on the question of shot wounds is withdrawn from the jury.

251 CHARLES SHEFFLER, recalled by the Government, on rebuttal testified:

Direct examination by Gen. FREDERICHS:

I now desire to have the stenographer read to Mr. Sheffler the testimony of the witness Bird, in which he stated that Sheffler, in the presence of Mrs. Strong, on the shore, after Patterson had been shot, said to him, or said to Bird, "You did right to shoot the Dutch son of a bitch;" whereupon Sheffler—whereupon Bird said to Sheffler, you're as deep in the mire as the others were in the mud, or words to that effect; whereupon Sheffler got down on his knees and prayed Bird not to shoot him, and swore to God he hadn't had a thing to do with it—I would like to have the stenographer read that to Mr. Sheffler.

By the COURT. I think you have stated the language, in substance, General. You may have a transcript of that part of the testimony made if you desire, or you may state it from memory to sufficient certainty, I should think.

Q. Mr. Sheffler, Mr. Bird, in his testimony yesterday testified in substance this: That after Patterson had been shot, and was lying on the shore, and he came up to him and was speaking with him, and while you and Mrs. Strong were there, you said to him, referring to the killing of Hurlin, you did right to kill the Dutch son of a bitch—this you said in the presence of Bird and Mrs. Strong and Patterson, addressing yourself to Bird and referring to Hurlin. Whereupon he said to you, you're as deep in the mire as they are in the mud; whereupon you immediately got down on your knees, threw your hands up, and swore to God you
252 hadn't anything to do with it, but that they wanted you to join them in the trouble, and you refused to do it. Is that true or false?

A. False.

Q. Did Mr. Patterson, for two months after he had been shot, come out and assist you in chopping wood?

A. No, sir.

Q. Did you ever see him chop wood—assist you or anyone else chop some forty cords of wood?

A. No, sir; because he couldn't do it.

Q. Was he ever out of the house until he was carried out?

A. Of course he was up and walked around.

Q. Inside or out?

A. He walked out once or twice, I believe.

Q. By himself?

A. Well, sir, by himself—of course someone had to be with him.

Q. He never chopped any wood, though?

A. He couldn't chop any wood.

Cross-examination by Mr. MALONY:

Didn't Bird and Patterson start in to chopping wood to make money enough for Patterson to get back home on?

A. No, sir.

Q. You were pretty badly scared after the shooting, wasn't you?

A. Yes sir; I was.

Q. You didn't say anything at all there; is that true?

A. I asked him not to shoot me, of course.

Q. Didn't you also say to him that they requested you to take part in any trouble that came up, and you refused?

A. No, sir.
Q. You are positive of that, are you?
A. I am, sir.

253 NAOMI STRONG, recalled on rebuttal, testified as follows:

Direct examination by Gen. FREDERICHS:

Mrs. Strong, the defendant Bird yesterday in his testimony stated that after Hurlin had been killed and Patterson shot—Patterson was lying on the river bank by the boat—that Sheffler and you and Bird were there, and that Sheffler said to Bird, referring to Hurlin, you did right to kill the Dutch son of a bitch. Whereupon Bird said to Sheffler, you're as deep in the mire as the others were in the mud; and Sheffler thereupon threw himself on his knees, threw his hands up, and swore to God he hadn't had a thing to do with it, and begged for his life, and that you at that time remarked, yes, and you ought to have killed Patterson, too, or words to that effect. Is that true or false?
A. That is false.
Q. All of it?
A. Yes, sir.
Q. From the time that Patterson was shot until these men carried him down below, did he ever get out and chop wood, or assist any other person in chopping wood?
A. He was up and around some, but he never chopped any wood.
Q. Never?
A. No; he went out where they were chopping wood and gathered chips to exercise himself, but he never chopped any wood or did any sawing or work of that kind.
Q. How soon after he had been shot did he do that much?
A. A couple of months. I'm not positive about that, but I know it was a good while after he was shot.
Q. Mr. Bird testified that for about two months after he was shot he got up and assisted him in cutting cord wood, and that they cut about forty cords, or he assisted in cutting about forty cords. Is that true or false?

254 A. No; Mr. Patterson never cut any wood.
Q. Is the statement that Patterson assisted for two months in cutting wood true or false?
A. It is false.
(Objected to by counsel for the defendant. The form of the question is improper. It is a conclusion for the jury whether it is true or false. Objection overruled. Exception.)

Cross-examination by Mr. MALONEY:

Did Sheffler make any statement at the time at all?
A. No; not that I remember.
Q. Not that you remember?
A. No, sir.
Q. Did he make any statement to the effect that Patterson and Hurlin had asked him to join with them in any trouble?
A. I told you that yesterday——
(Objected to by counsel for the Government as not proper cross-examination.

By the COURT. She has now denied the statement. She can not be further cross-examined on that.

Question withdrawn.)

Q. You state that Mr. Sheffler never made any such a statement as General Frederichs has asked you about a moment ago about what Sheffler said and did?

A. I don't remember any more what they said; that's been so long ago.

Q. Do you remember this—that you testified to this same point on the last trial of this case?

A. I don't remember whether I did or not, Mr. Maloney.

255 Q. That you testified to this—this was just after the shooting that you were talking about: "Why, Mr. Sheffler told Mr. Bird that Mr. Patterson and Hurlin asked him if there would be any trouble when they were dividing the goods, would he take a hand in it?"

(Objected to as repetition and as referring to another time and place.

By the COURT. If you can discredit the witness at all on that proposition, haven't you already done so? I think you have disputed her on that point as far as you may, and that another denial on her part would have no tendency to discredit her further.)

256 F. D. KELSEY, called on rebuttal, and being first duly sworn, on his oath deposed and testified as follows:

On direct examination by Gen. FREDERICHS:

Mr. Kelsey, what experience have you had with shotguns?

A. I have used shotguns most all my life.

Q. All kinds?

A. Yes, sir; from an old bored-out musket up to the modern pattern of a hammerless.

(Counsel for the defendant objects to Mr. Kelsey testifying in this case on the ground that the witnesses were excluded under the rule, and he has been in the room here and heard most all of it. He was allowed to remain in the room on the understanding that he would only testify about the typewriting and reporting of the other case.

By the COURT. The rule is simply this: That no one can be deprived of the testimony of a witness because he has disobeyed an order of the court. There was some misunderstanding on the part of counsel, perhaps, but I don't feel that the circumstances are such that I could deprive either party of the testimony.

Objection withdrawn.)

Q. Mr. Kelsey, has your experience been sufficient in the use of shotguns to enable you to know and to form a judgment as to the effect of shots fired from a shotgun at different distances and objects?

257 A. Yes, sir; I have made experiments a number of times.

Q. What has been the nature of your experiments?

A. Well, sir; I have shot at boards, through cotton, and various things, and I have also seen a human head that was shot from a distance of five feet.

Q. Have you seen the wound from a shotgun on the head of a human being?

A. I have.

Q. At what distance did you say?
A. At a distance of five feet.
Q. Where was the individual struck?
A. He was shot right in here [indicating side of head].
Q. What was the effect of the shot as to whether it was concentrated in one place——
By the COURT. You needn't answer that question.
Q. Is there any difference as to the effect of the shot against an object as to what it is, whether it is a plank, or cloth, or flesh, will the impact be the same or different?
A. Yes, sir; you can't shoot through a piece of cotton——
(Objected to by counsel for the defendant as irrelevant and immaterial. Objection overruled. Exception.)
It makes a big difference whether it is a hard substance or whether it is soft and pliable.
Q. What difference would it make whether it was a human head or a a man with clothes on fired at from a short distance?
A. I can't state that; I never tried.
Q. What difference would there be ordinarily in the scatter or concentration of shot fired at a distance of from four to eight feet?
A. It would depend on the gun, and on the shell, and the charge of powder, and the amount of shot, the number of wads between the
258 shot, and a good many things—pretty hard to say.
Q. Would the effect be different, would there be as many differences as there would be in the kinds of powder, or guns, or shot, or barrels?
A. O, yes; it's pretty hard to say.
Q. Is it possible to establish a certain rule with reference to the shots of different shotguns as to their being scattered or concentrated, or otherwise?
(Objected to as incompetent and immaterial. Objection overruled. Exception.)
A. To establish a rule?
Q. Yes, sir.
A. That would take in all shotguns?
Q. Yes.
A. I don't think so.

Cross-examination by Mr. COBB:

How old are you?
A. Thirty-six.
Q. How long have you lived in Alaska?
A. Since 1892.
Q. As a matter of fact, most of your experience with the use of a shotgun has been acquired up here at the Bar, hasn't it?
A. O, no. I used to use a shotgun long before I came to Alaska.
Q. As a matter of fact, you don't know much about shotguns?
A. Well, I think I have used them a good deal and ought to know.
Q. You know this, that when a gun is a choke bore it will throw shot closer than when it isn't?
A. Yes, sir; without doubt.

Q. And you know that from four to six feet it scatters but very little, too, don't you?

259 A. Very little.

Q. Would you say that hole was made by a choke bore? [Referring to hole in box.]

A. I can't tell.

Q. If the distance was five to six feet what would you say about it?

A. From the end of the gun?

By the COURT. It doesn't seem to me you can cross-examine Mr. Kelsey; it doesn't prove anything one way or the other; the subject is not capable of positive proof.

The United States rests.

By the COURT. Now, is it the desire of counsel to have these diagrams marked in evidence? They haven't been introduced, either of them.

By Mr. COBB. Yes, sir; we consent.

By Gen. FREDERICHS. Let them go in for what they're worth.

Whereupon both parties rest and the evidence is closed.

The above and foregoing is all the evidence introduced by either party.

260 And the court thereupon instructed the jury in writing as follows:

UNITED STATES }
vs. }
HOMER BIRD. }

GENTLEMEN OF THE JURY: The charge upon which the defendant, Homer Bird, is being tried in this case is for the crime of the murder of one J. H. Hurlin, alleged to have been perpetrated on the 27th day of September, in the year of our Lord one thousand eight hundred and ninety-eight. At the time the alleged crime was committed the district of Alaska was a district or territory belonging to the United States and under the exclusive jurisdiction of the General Government. As said offense is alleged to have been committed at a time prior to the enactment of a criminal code for Alaska, the penalty of the law then in force is now in force in Alaska as to offenses committed prior to said enactment of a criminal code for Alaska, and the law then in force must be enforced and the trial of this case had thereunder.

The act of Congress upon the subject does not define the crime in terms, the section of the statutes in force at the time the crime in this case is alleged to have been committed being as follows:

"SEC. 5339. Every person who commits murder—

"First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

"Second. Or upon any of the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State;

"Third. Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either

on land or sea, within or without the United States, shall suffer death."

Murder was a crime at common law, and a legislative act which
261 refers to the crime and fixes a penalty therefor is presumed to refer to the crime as understood and defined at common law. We must therefore resort to the common law authorities for a definition of the offense you are now trying.

It is said by Blackstone that the crime of murder is committed "when a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the state, with malice aforethought, either expressed or implied," and I shall adopt the foregoing definition for the purposes of this case, and you will accept it as the law descriptive of this offense.

Manslaughter may be defined under the United States statutes as follows:

"SEC. 5341. Every person who, within any of the places or upon any of the waters, described in section fifty-three hundred and thirty-nine, unlawfully and wilfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another, of which striking, stabbing, wounding, shooting or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter."

The jury in this case may find the defendant guilty of murder or manslaughter, according to the facts as you find them. If the jury are satisfied beyond a reasonable doubt that the defendant, Homer Bird, on or about the time laid in the indictment, within the district of Alaska, wilfully and feloniously and with malice aforethought, either express or implied, killed the deceased, J. H. Hurlin, as charged in the indictment, then he is guilty of murder, and you should so find.

Fifth exception:

To which giving said instruction the defendant then and there objected and excepted.

The court thereupon further instructed the jury as follows:

If, however, you are not satisfied beyond all reasonable doubt
262 that the defendant is guilty of murder, and you believe from the evidence in the case beyond a reasonable doubt that the defendant unlawfully and feloniously killed the deceased Hurlin in a heat of passion upon a sudden quarrel, and not with malice aforethought, the defendant is then guilty of the crime of manslaughter, and you should so find, unless you find from the evidence in the case that the killing was with justifiable cause or legal excuse, as explained in these instructions. If you should find that the defendant killed the said Hurlin under circumstances making the act either justifiable or excusable, as described in these instructions, you should find the defendant not guilty.

Malice aforethought or criminal intention to take the life of another must exist in the mind of the slayer at the moment he commits the overt act resulting in the death of another. In other words, the malicious intent and the overt act must be coexistent, even though premeditation and malice may have existed in the mind of the slayer for only a moment before the commission of the act resulting in the death. The length of time which the mind of the slayer has been in the condition or state of malice, or the length of time within which the criminal intention to take life has existed, makes no difference. If it is present in the mind of the

slayer when the overt act is done, and such act is done without provocation, excuse, or justification, and in cold blood, the crime is murder.

Express malice is that deliberate intention to take away the life of a fellow-creature which is manifested by external circumstances capable of proof. Malice is implied when no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

The court instructs the jury that malice within the meaning of the law includes not only anger, hatred, and revenge, but every other unlawful or unjustifiable motive. Malice is not confined to ill will toward another, but it is intended to denote any action flowing from any vicious or corrupt motive.

263 The jury is instructed that malice is always implied in law from a wrongful criminal act, unless the evidence shows that the defendant was acting from some innocent or proper motive; that when one person assaults another violently with a dangerous weapon likely to kill, not in self-defense or in defense of habitation, property, or person, and not on a sudden heat of passion caused by a provocation apparently sufficient to make the action irresistible or involuntary, and the life of the person thus assaulted is actually destroyed in consequence of such assault, then the legal and natural presumption is that death or great bodily harm was intended, and in such case the law implies malice, and such killing would be murder.

The court instructs the jury that the law is: If a person is assaulted in such a way as to induce in him a reasonable belief that he is in actual danger of losing his life or suffering great bodily harm, he will be justified in defending himself, although the danger be not real, but only apparent. Such a person will not be held responsible criminally if he acts in self-defense from a real and honest conviction of the character of the danger, if there is, in fact, apparent danger induced by reasonable evidence, although the defendant may be mistaken as to the extent of the danger.

You are further instructed, gentlemen of the jury, that the law recognizes the right of self-defense; and if you find and believe from the evidence that the defendant, Homer Bird at the time of killing the said J. H. Hurlin the said Hurlin was in the act of making an assault upon the defendant with a deadly weapon, or was making such demonstrations against the defendant as would cause a reasonably prudent man to believe, and that the defendant did believe, that the deceased Hurlin was about to make a deadly assault upon him, then the defendant had a right to protect himself against such assault or attempted assault, even to the extent of taking the life of the deceased. And in judging whether or not the defendant was justified in shooting the deceased Hurlin,

264 if you find he did shoot said Hurlin, you are to take into consideration all the circumstances surrounding the parties at the time, and judge of the acts of the defendant from all the facts and circumstances as they *they* appeared to him. If he had reasonable ground to believe, and did believe at the time the fatal shot was fired, that it was necessary to shoot the said Hurlin in order to save his own life, or to protect himself from serious bodily harm at the hands of Hurlin, and that such danger could not have been avoided by the defendant by retreating or by some

other method without thereby increasing the danger to himself, you will find the defendant not guilty. The law of self-defense has long been recognized as the right of a person unlawfully assaulted to defend himself and to return the assault with equal force, or with such force as will compel his assailant to desist, even to the point of taking life if necessary to preserve his own. This right of self-defense may be defined as follows:

Justifiable homicide is the killing of a human being in self-defense who manifestly intends or endeavors by violence or force to commit a felony upon the person assaulted. A mere fear that such an offense will be committed upon him is not sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fear of a reasonable man, and that the party killing acted under the influence of such fear. But no one has a right to kill another in self-defense, unless such killing is apparently necessary for such defense. Before a person can justifiably take the life of a human being on the ground of self-defense, he must, if attacked, employ all reasonable means within his power, consistent with his safety, to avoid the danger and avert the necessity of killing.

In considering whether the killing in this case was justifiable or excusable on the ground of self-defense, the jury should consider all the circumstances attending the killing, the conduct of the parties at the
265 time and shortly prior thereto, and their respective situations at the time. You should determine from the evidence in this case whether the several parties were situated at the time of the killing as described by the witnesses for the prosecution or as described by the defendant himself.

Sixth exception.

The court thereupon further instructed the jury as follows:

In this connection you may consider whether the gun of the defendant was placed at a point near his bed, as stated by the witnesses for the prosecution, and whether the defendant took his gun from the point where it was described to have been placed by the witnesses for the prosecution, and whether, without any act on the part of the deceased or either of those sitting near him, he, maliciously, from behind the backs of these men, when no attack was made against him in any way, wilfully and maliciously shot the deceased Hurlin in the back and side of the head, thereby taking his life, or whether the statement of the defendant is true, that a quarrel ensued between himself and Patterson, while discussing their accounts, that blows passed between them, and that after hearing the witness Naomi Strong say, "They are getting their guns"—if he did hear any such thing, and if you so find—whether he sprang down to a point near the water barrel and there seized his gun, and, immediately raising the same, shot Hurlin, while he, the said Hurlin, was in the act of attempting to draw a gun from his sleeping bag; and if all of that was true, as the defendant states, whether he was under the necessity of immediately shooting and killing the said Hurlin in order to protect his own life, or if, as the situation then appeared to him, such necessity of immediately shooting Hurlin, in order to save his own life, existed.

Sixth exception.

The court thereupon further instructed the jury as follows:

If you find from the evidence that the statements of the defendant, Bird, in these respects are true, and that the statements of the witnesses of the prosecution are not true, and that the defendant, Bird,
266 shot and killed the said Hurlin under circumstances as they then appeared to him necessary for the protection of his own life, then you should find him not guilty. But if you should further find that the statement of the defendant, Bird, is true as to the acts of the said Hurlin, as to obtaining his own gun in the manner he describes, and yet the apparent danger was not such as to make it necessary, or apparently necessary, for him to kill the deceased Hurlin without giving him any warning—if you find he gave him no warning—and without calling upon him, the said Hurlin, to desist in his efforts to obtain his gun, and that the defendant under such circumstances shot and killed the deceased Hurlin without apparent necessity therefor in order to preserve his own life, then you should find the defendant guilty of manslaughter at least.

But, in determining this matter under the evidence before you, you must consider the situation of the parties at the time, and all the surrounding circumstances, together with the testimony of the witnesses for the prosecution, as well as the evidence of the defendant.

To which said instruction the defendant then and there excepted because erroneous and not the law.

267 And the court thereupon further instructed the jury as follows:

In determining whether under all the facts and circumstances of the case the defendant was under the apparent necessity of taking the life of the deceased (Hurlin) in order to save his own, or whether the assault, if there was an assault by Hurlin or the others, was such that the defendant, in the position in which he found himself, could have reasonably avoided taking the life of the deceased without thereby endangering his own. These and all other circumstances surrounding the parties at the time, as they reasonably appeared to the defendant, are to be considered by the jury in determining whether the defendant in shooting the deceased (Hurlin) was acting under the instinct of self-preservation and with a view of defending and preserving his own life, or whether it was from an unlawful purpose in carrying out a premeditated and malicious design.

Eighth exception:

The court further instructed the jury as follows:

Evidence has been offered of the escape of the defendant or attempted escape after arrest on the charge on which the defendant is now being tried. This evidence is admitted on the theory that the defendant is in fear of the consequences of his crime and is attempting to escape therefrom—in other words, that guilt may be inferred from the fact of escape from custody. The court instructs you that the inference that may be drawn from an escape is strong or slight, according to the facts surrounding the party at the time. If a party is caught in the act of
268 crime and speedily makes an attempt for liberty under desperate circumstances, the inference of guilt would be strong; but if the attempt was made after many months of confinement, and escape comparatively without danger, then the inference of guilt to be drawn from an escape is slight; but whether the inference of guilt is strong or slight depends upon the conditions and circumstances surrounding the accused person at the time.

To which said instruction the defendant then and there objected and excepted.

And the court further instructed the jury as follows:

Two theories are presented for your consideration: One under the testimony of the witnesses for the prosecution and one under the testimony on behalf of the defendant. If the killing was done under the circumstances described by the witnesses for the prosecution, and you so find, and that you are satisfied of this beyond a reasonable doubt, then it is impossible that the theory of the defense as described by the defendant himself can be true. There is no half-way ground between the facts and conditions as described by the defendant and as described by the prosecuting witnesses. If you find, therefore, beyond a reasonable doubt, that the defendant, on the day and at the time stated in the indictment, wilfully, feloniously, and of his malice aforethought shot Hurlin in the back and side of the head when no demonstration whatsoever was being made against him by said Hurlin or any other one of the party then present, then the defendant is guilty of murder and you should so find.

Ninth exception:

The court in instructing the jury then further said:

269 You are instructed that every person accused of crime is presumed to be innocent, and that presumption should be permitted to continue in your mind throughout the case until it is overcome by credible evidence which satisfies you of the guilt of the accused beyond a reasonable doubt. The rule which clothes every person accused of crime with the presumption of innocence and imposes upon the prosecution the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid anyone who is in fact guilty of crime to escape, but is a humane provision of the law intended to guard, so far as human agencies can, against the danger of an innocent person being unjustly punished.

To which said instruction the defendant then and there objected and excepted.

The court then further instructed the jury as follows:

The court instructs the jury that the credibility of the witnesses and the weight to be given to their testimony is a question exclusively for the jury. The jury have the right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all other surrounding circumstances appearing on the trial, which witness or witnesses are the more worthy of credit, and give credit accordingly.

270 You may also take into consideration any interest which the witness may feel in the result of the trial, if any is proved, and you are not bound to believe anything to be a fact because one witness has stated it to be so; provided you believe from other credible evidence or circumstances in the case that such witness was mistaken or has knowingly testified falsely, but you are not to cast the testimony of a witness aside upon any caprice or without reason. If the testimony of the witness appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not in any manner been impeached, then you have no right to disregard the testimony of such witness without cause. It is the duty of the jury to consider the whole evidence, and render a verdict

in accordance with the facts proved upon such a trial. It is your duty to give proper credit to each and all of the witnesses, and if possible, to reconcile all the evidence in the case with the presumption that each witness has intended to speak the truth, unless by their manner of testifying on the witness stand and by inconsistent statements or by testimony inconsistent with other credible testimony in the case, you are led to believe the testimony of some one or more of the witnesses is untruthful and unreliable, or unless you are led to believe from manifestations of interest, bias, or prejudice, that such witness or witnesses have been inclined to color or suppress the truth. The law gives the person accused of crime the right to testify in his own behalf, but his credibility and weight to be given to his testimony are matters exclusively for the jury. Therefore, in weighing the testimony of the defendant you have a right to take into consideration his manner of testifying, the reasonableness or unreasonableness of his account of the affair, his interest in the result of the case as affecting his credibility, and the weight to be given to his testimony. You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction; but you have no right to disregard the testimony of the defendant on
271 the ground alone that he is the defendant and stands charged with the commission of the crime. The jury should fairly and impartially consider his testimony, together with all the other evidence in the case.

The court instruct the jury that in this, as in all other criminal cases, before a conviction can be had the jury must be satisfied from the evidence beyond a reasonable doubt that the defendant is guilty in manner and form as charged in the indictment. In other words, it devolves upon the prosecution to prove beyond a reasonable doubt all the material averments of the indictment.

The court further instructs the jury that this is not a civil case, but is a criminal prosecution, and that the rules as to the amount of evidence in this case are different from those in civil cases and the mere preponderance of the evidence would not warrant the jury in finding the defendant guilty, nor is it sufficient that the greater weight or preponderance of the evidence support the case of the Government, nor is it sufficient that upon the doctrine of chances it is more probable that the defendant is guilty than that he is innocent. To warrant a conviction of the defendant he must be proved to be guilty so clearly and conclusively that there is no reasonable theory upon which he can be innocent, when all the evidence in the case is considered together, and even then the evidence may be so strong that it demonstrates the probability of the guilt of the defendant; still, if it fails to show his guilt beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis of his innocence in view of all the evidence, then it is your duty to acquit.

The court instructs the jury as a matter of law that in considering this case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt to justify an acquittal must be reasonable and must arise from a candid and impartial consideration of all the evidence in the case. A

doubt produced by undue sensibility in the mind of any juror in
272 view of the consequences of his verdict is not a reasonable doubt, and a juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to a possible state of facts. Unless a doubt is such that were the same kind of doubt interposed in the graver transactions of life would cause a reasonable and prudent man to pause and hesitate. It is insufficient to authorize a verdict of not guilty. It is not necessary that guilt should be established beyond all doubt and to an absolute certainty. Absolute certainty in proof of crime is rarely attainable and never required.

If after considering all the evidence you have an abiding conviction to a moral certainty of the truth of the charge, you are satisfied beyond a reasonable doubt. The jury is further instructed that if you find the defendant guilty of murder you may add to such a verdict the words "without capital punishment;" if you find the defendant not guilty of murder and guilty of manslaughter, then you will say: "We, the jury find the defendant not guilty of murder and guilty of manslaughter as charged in the indictment." If you find the defendant not guilty of either of these crimes, you will say by your verdict: "We, the jury, find the defendant not guilty." In any verdict given the same will be signed by your foreman.

If after considering all the facts of this case you conclude that the defendant has been proved guilty beyond all reasonable doubt, it is your duty to so find by your verdict. If you are not so satisfied, it is your duty to return a verdict of not guilty. If in these instructions I have called your attention to certain matters of fact, you will understand that it is not with the purpose of indicating to the jury the opinion of the court as to the facts proved by the evidence in the case; it is only to indicate to you the various matters in issue. What is proved by the evidence in the case is a matter wholly for you. You are to determine, and no one else, what facts have been established by the evidence.

273 I have endeavored to give you, as briefly as possible, the law which shall guide you in your deliberation under the evidence that you have heard from the witnesses on the stand. You are bound to take the law from the court. If I have made mistakes, my mistakes or errors may be remedied. If you should decide this case upon any theory of the law of your own, it would be impossible to remedy your mistake if you should be in error. It is for this reason, with many others that might be urged, that you are required to take the law from the court.

You will carefully read these instructions, compare them carefully, consider them carefully, and when you have done so, consider the evidence in this case under the law as it is here given. Don't be in haste. This is a matter of the highest importance to the defendant and to the people. You have so far given the case very careful attention. Your demeanor has at all times been excellent. Continue to consider this cause with the same care that you have exercised throughout the trial. Act dispassionately, candidly, honestly, and, whatever your conclusions, your conduct will be above criticism. When you have agreed upon a verdict, return it into court.

Several forms of verdict are submitted to you with these instructions.

You may take with you to your jury room to aid you in your consideration of the evidence all the exhibits that have been offered in the case. You will select one of your number as foreman, and when you have agreed upon a verdict let it be subscribed by him in your presence. You will then inform the bailiffs of the fact that you have agreed upon a verdict and you will be brought into court to deliver your verdict into the court.

And the above and foregoing were all the instructions given the jury.

Tenth exception:

And the defendant, before the argument of the case began,
274 prayed the court in writing to give to the jury the following instructions:

"GENTLEMEN OF THE JURY: You are instructed that an accomplice in law means anyone who participates in an offence, whether as principal or as accessory; and you are further instructed that an accessory is one who is guilty of an offence, not by committing the offence in person or as principal, but by being in some way guiltily concerned therein, as by advising or inciting another to commit a crime, or by concealing the principal offender, or by concealing or aiding the guilty party, after having knowledge of his guilt, or helping him to escape punishment. And you are further instructed that you cannot convict upon the uncorroborated testimony of an accomplice, and if you find and believe from the evidence that the witness Sheffler was an accomplice in the killing of the deceased Hurlin by the defendant, yet, if you find there is no other evidence connecting the defendant with the commission of the crime except the testimony of such accomplice, or unless the testimony of such accomplice as to the main and material facts constituting the crime are corroborated by other evidence, you cannot find the defendant guilty; but such corroborating evidence must be something more than the mere showing that the crime had been committed and must tend directly to connect the defendant with the act itself, and with each and every element that enters into the commission of the crime charged, and unless the testimony of such accomplice is so corroborated, you will acquit."

"Second. You are instructed that the testimony of one accomplice does not corroborate the testimony of another accomplice, and if you find and believe from the evidence that the witnesses for the Government, Charles Sheffler and Naomi Strong, were both accomplices in the killing of J. H. Hurlin, the deceased, and that their testimony tending to prove the defendant guilty of the crime charged in the indictment is not corroborated by any other evidence except their own, tending to connect the defendant with such killing, and the killing of the deceased in
275 such manner as would make it a crime, then you must find the defendant not guilty."

Third. You are instructed that a conviction in this case can not be had upon the testimony of an accomplice, unless such testimony be corroborated by such other evidence as tends to connect the defendant with the commission of the crime; and the corroboration is not sufficient if it morely show the commission of the crime and the circumstances of the commission, but such corroboration must go to the extent of corroborating the testimony of the accomplice upon each and every one of the

material allegations in the indictment which are necessary to constitute the offence charged, and if you find and believe from the evidence that the witnesses Charles Sheffler and Naomi Strong were accomplices in the killing of J. H. Hurlin, if you find he was killed, and that their testimony tending to connect the defendant with such killing, and with such other facts as would make such killing a crime, is not corroborated by other competent evidence, you must acquit. And this corroboration must not be only to the fact of the killing of deceased, but to the guilty intent and to all the facts and circumstances which would make such killing a crime under the instructions given you by the court."

But the court denied said prayer and refused to so instruct the jury, to which ruling of the court the defendant then and there excepted.

Eleventh exception. And the defendant before the argument began further prayed the court in writing to instruct the jury as follows:

"GENTLEMEN OF THE JURY: In considering the testimony in this case, and in determining the credibility of the witnesses, it is your duty to weigh and judge the testimony of the light of the common knowledge and experience of mankind and to apply such knowledge and experience to the facts testified to. The witnesses for the Government testify that the defendant shot the deceased with a shotgun loaded with large shot, in the back of the head, from a distance of not exceeding four feet; that the head of the deceased, at the time the shot was fired, was
276 immediately between the defendant and the witness Naomi Strong; but that none of the shot struck said witness, but were all stopped by the head of the deceased. It is further testified by the witnesses for the Government that the defendant immediately shot and wounded one R. L. Patterson with the other barrel of the shotgun, similarly charged with large shot, and that at the moment of such shooting the said Patterson was at a distance of from four to six feet from the muzzle of the gun; that the charge of shot took effect on the body of said Patterson from about the lower point of the shoulder blade upwards to a point in the left jaw underneath the ear, one coming out of the mouth and another coming out just on the right side of the nose.

"Most men in this country have more or less knowledge and experience of the effect of a gun shot discharged at close range, as to the extent of its penetration, and the extent to which the shot will scatter; and if, in the light of such knowledge and experience as you may have had, as well as the evidence in the case, you do not believe that the shooting of the deceased occurred in the manner testified to by the witnesses for the Government, you should acquit. Or, if you have a reasonable doubt as to whether such shooting occurred in that manner, you must give the defendant the benefit of that doubt and acquit him. And in determining whether the shooting of the deceased occurred in the manner claimed by the Government or not, it is your duty to consider all the matters testified to in that connection, and the probability or improbability of the woman escaping unhurt from the shot claimed to have been fired at the deceased's head, and the probability or improbability of the shot claimed to have been fired at Patterson scattering at that range to the extent testified to by the Government witnesses. And if the story as a whole seems improbable to you, it is sufficient to raise a reasonable doubt as to the defendant's guilt and you must acquit him."

But the court denied said prayer and refused to so instruct the
277 jury, to which ruling of the court the defendant then and there excepted.

Twelfth exception:

And the defendant, before the argument began, further prayed the court in writing to instruct the jury as follows:

"In this case it has been testified to, on behalf of the Government, that the defendant made an attempt to escape while at St. Michaels. This was long after the offence with which he is charged is alleged to have been committed and some months after his arrest. Evidence of attempted escape, or flight, is admitted as tending to establish an inference of guilt on the part of the accused in connection with other evidence. Alone it is insufficient to establish such an inference at all. And in considering it in connection with other evidence, the jury are to carefully remember that there may have been other reasons leading to such attempt to escape besides a consciousness of guilt, such as the distance to the place of trial, the natural fear that men have when charged with the commission of a grave crime, however innocent they may in fact be, the consciousness that witnesses are hostile, or other reasons that might be entirely consistent with innocence."

But the court denied said prayer and refused to so instruct the jury, to which ruling of the court the defendant then and there excepted.

Thirteenth exception:

And the defendant, before the argument began, further prayed the court in writing to instruct the jury as follows:

"GENTLEMEN OF THE JURY: In judging of the defendant's right of self-defense, you must take into consideration the situation in which the defendant was placed, the circumstances surrounding him, his individual character, the apparent danger which threatened him, and if, in view of all these circumstances, you find and believe that the defendant honestly believed that it was necessary, in order to protect his own
278 life, or to save himself from great bodily harm, to shoot and kill the deceased, then you will find him not guilty, or if you have a reasonable doubt whether the defendant did not so act in self-defense, then you will acquit."

But the court denied said prayer and refused to so instruct the jury, to which ruling of the court the defendant then and there excepted.

Fourteenth exception:

And before the argument began the defendant further prayed the court in writing to instruct the jury as follows:

"GENTLEMEN OF THE JURY: If you find and believe from the evidence that the defendant had reason to believe and did actually believe that the deceased J. H. Hurlin and one Robert Patterson were plotting to ass'inate him, and at the time of such information came to him and up to the time of the death of deceased, the defendant had no opportunity to appeal to the law for protection and was compelled to rely on his own individual resources to protect himself against such expected assassination, and if at the time of the killing he further believed and had reason to believe that deceased was about to attempt such assassination, pursuant to a previous understanding and plotting between the said Hurlin and Patterson, then he had a right to act upon such belief and to take

such steps, as in view of all the surrounding circumstances, as appeared to him to reasonably necessary to protect himself and to save himself from such threatening attack; and if you find that the defendant shot and killed the said J. H. Hurlin, believing, and having a right to believe from his standpoint, in view of all surrounding circumstances, that such shooting was necessary, then you will acquit.

"In judging of the reasonableness or unreasonableness of the defendant's conduct and belief, you must take into consideration the remoteness of the parties from civilization and all legal protection against any threatened injury, and not judge him as you would a person who
279 would commit a similar act in a settled community or where a person would not be thrown so entirely upon his own resources for his protection."

But the court denied said prayer and refused to so instruct the jury, to which ruling of the court the defendant then and there excepted.

Fifteenth exception:

And the defendant, before the argument began, further prayed the court to instruct the jury as follows:

"The jury are instructed that the law presumes the defendant innocent in this case, and not guilty as charged in the indictment, and the presumption should continue and prevail in the minds of the jury until they are satisfied by the evidence, beyond all reasonable doubt, of the guilt of the defendant, unless you are constrained to find him guilty by the evidence of witnesses of such guilt beyond a reasonable doubt. And this presumption of innocence is not a mere fiction, but a substantial right upon which you, upon your oaths as jurors, must act and be guided by, and continues with the defendant and guards him against a conviction until you are satisfied by the evidence, beyond a reasonable doubt, that he is guilty of the crime charged. And the court further instructs you that this presumption of innocence goes to every material fact charged in the indictment and necessary to be proved in order to constitute the crime charged."

But the court denied said prayer and refused to so instruct the jury, to which ruling of the court the defendant then and there excepted.

Sixteenth exception:

And the defendant, before the argument began, further prayed the court in writing to instruct the jury as follows:

"You are instructed that in this case if a reasonable doubt of any fact necessary to convict the accused is raised in the minds of the
280 jury by the evidence, or by any hypothesis reasonably consistent with the evidence, that doubt is decisive in favor of the prisoner's acquittal."

But the court denied said prayer and refused to so instruct the jury, to which ruling of the court the defendant then and there excepted.

Seventeenth exception:

And the defendant, before the argument began, further prayed the court to instruct the jury as follows:

"The jury are instructed that the defendant is not on trial for the shooting of one R. L. Patterson, and you are not to consider any of the evidence tending to show that the defendant did shoot R. L. Patterson for the purpose of establishing the guilt of the defendant as to the commission of the crime charged in the indictment, nor are you to allow

any such evidence to influence you in making up your verdict as to whether or not the defendant is guilty in this case, such evidence as to the shooting of R. L. Patterson being only admissible as part of the res gestae."

But the court denied said prayer and refused to so instruct the jury, to which ruling of the court the defendant then and there excepted.

Eighteenth exception:

And the defendant, before the argument began, further prayed the court to instruct the jury as follows:

"GENTLEMEN OF THE JURY: You are instructed that it is the duty of a party to a cause to produce all the evidence bearing upon the issues to be tried that is material and reasonably attainable, so as to throw all the light possible upon the questions to be determined, and a failure to produce all such evidence raises a presumption against the party so failing, and if you find and believe, from the evidence in this case, that there are material witnesses which the Government could reasonably have produced on this trial, and whose testimony would have thrown
281 additional light upon the circumstances of the killing of J. H. Hurlin, and the Government has failed to produce such witnesses, then you may take into consideration these circumstances, in connection with all the other evidence in the case, in determining whether or not the prosecution had made out a case showing the guilt of the defendant beyond all reasonable doubt; and if this circumstance—that is to say, the failure of the Government to produce all the evidence that it could reasonably have produced, if you find there has been such failure, taken in connection with all the other evidence in the case—raises in your mind a reasonable doubt of the guilt of the defendant, then you will acquit."

But the court denied said prayer and refused to so instruct the jury; to which ruling of the court the defendant then and there excepted.

Nineteenth exception. And the jury having returned a verdict on December 25th, 1901, finding the defendant guilty of murder as charged in the indictment, the defendant on December 26th, 1901, filed his motion in arrest of judgment, which is as follows, to wit:

UNITED STATES
vs.
HOMER BIRD. } No. 1327. Motion in arrest of judgment.

Now comes the defendant in his own proper person and by his attorneys and moves the court to arrest the judgment herein on the verdict rendered on the 25th day of December, A. D. 1901, for the following reasons, to wit:

I.

Because there has never been any plea entered in this court by the defendant, the only plea ever made by him being in the district court for Alaska, established by the act of Congress of May 17th, 1884, which was abolished by the act of Congress of June 6th, 1900.

282 II.

Because the court has no jurisdiction of this cause, the indictment herein having been returned into the district court for Alaska, estab-

lished by the act of Congress of May 17th, 1884, and not into this court, and there is no law conferring upon this court jurisdiction over indictments returned into said court.

III.

Because this court has no jurisdiction of the offence charged in the indictment herein, in this: The said indictment charges an offence under section 5339 of the Revised Statutes of the United States, while this court has no jurisdiction of crimes except as defined in the criminal code for Alaska.

(Signed) MALONY & COBB.

Said motion came on for hearing on the 6th day of January, 1902, and was by the court overruled and denied; to which ruling of the court the defendant then and there excepted.

And the defendant also on the said 26th of December, 1901, filed his motion for a new trial.

283 In the United States district court for Alaska, Division No. 1, at Juneau.

UNITED STATES, }
vs. } No. 1327. Motion for new trial.
HOMER BIRD. }

Now comes the defendant herein, in his proper person and by his attorneys, and moves the court to set aside the verdict of the jury herein and grant him a new trial hereof for the following reasons, to wit:

I.

Because the court erred in overruling the objections of the defendant to being placed on trial before the petit jury drawn and impannelled at this term of the court, and compelling defendant to go to trial, and select the trial jury from such panel, because the said petit jury for this term of court had not been selected and drawn as required by law in this: The record fails to show that the 300 names of jurors placed in the box from which the jury were drawn, were placed therein alternately, one by the clerk, and one by the commissioner, as required by law; but only shows that the clerk placed 300 names in such box in connection with Chas. D. Rogers, said commissioner.

II.

Because of an abuse of discretion on the part of the court in refusing the application of the defendant to continue this cause to enable him to procure the testimony of M. C. Jansen, John Thompkins, John Doe Wallace, John Doe Black, John Doe Hendrix, and John Chapman, whereby defendant was prevented from having a fair and impartial trial.

III.

Because the court erred in sustaining the objection of the Government to the question of the defendant's counsel to the witness called
284 Naomi Strong, as to whether she had not been convicted of theft, it being expected to draw that said witness had been convicted of

the theft of a diamond stud and had served a term in the penitentiary therefor.

IV.

Because the court erred in refusing to make the witness called Naomi Strong disclose her true and legal name, and thereupon sustaining the defendant's object to her testifying in this case because her name had not been furnished to defendant or his counsel two days before the defendant was placed upon his trial, as required by law.

V.

The court erred in the instruction given the jury in defining the crime of murder in this: Said instruction failed to define murder in the second degree, as provided under the code, but limited its definition to murder and manslaughter, as defined in common law; which offence has been abolished in Alaska, without any jurisdiction being saved to this court to try the same.

VI.

The court erred in that part of the instructions to the jury contained on pages 10 and 11 thereof in this: The jury are instructed in substance that if they find the testimony of the witnesses untrue, and the testimony of the defendant true, etc., thereby limiting the consideration of the jury in considering the theory of the prosecution and the theory of the defence to a preponderance of the evidence, when the jury should have been told that before they could convict on the theory of the witnesses for the prosecution they must believe said witnesses beyond all reasonable doubt. 2nd, said portion of said charge is further erroneous in this: The court instructed the jury that if they believed the statement of the defendant "as to the acts of the said Hurlin in obtaining his own gun was true, and yet that the apparent danger was not such as to make it necessary, or
285 apparently necessary, for him to kill the deceased Hurlin without giving him any warning—if you find he gave him no warning—and without calling upon him, the said Hurlin, to desist in his efforts to obtain his gun, and that the defendant under such circumstances shot and killed the deceased Hurlin, without apparent necessity therefor in order to preserve his own life, then you should find the defendant guilty of manslaughter, at least," thereby assuming as a fact that the danger was only apparent and not real; and thereby limiting the danger, or apparent danger, to the acts of Hurlin alone, while the evidence tended to show that one Paterson was acting with Hurlin, and was also attempting to get a gun immediately after an assault upon the defendant; and said instruction authorized the jury to convict the defendant of murder upon his own testimony, or of manslaughter, while said testimony would authorize said conviction at all. 3rd, that portion of said charge is further erroneous in this: The jury in effect are instructed that though they disbelieve the testimony of the witnesses for the Government and believe the testimony of the defendant, yet in passing upon his guilt or innocence from his own testimony, they must still consider the testimony

of the witnesses for the prosecution in connection therewith; while as matter of law, if the jury disbelieved the testimony of the witnesses for the prosecution, they should not have considered the same for any purpose.

VII.

The court erred in its instruction on page 1, or on the matter of the attempted escape of the defendant at St. Michaels, in this: 1st, said instruction assumes, as a matter of fact, that defendant is guilty of the crime charged. 2nd, said instruction in effect tells the jury that they may infer guilt from such attempted escape alone, instead of instructing them it is only a circumstance from which, in connection with other evidence, guilt may be inferred; but that alone, no such inference can be drawn.

VIII.

286 There is error in the instructions of the court on pages 13 and 14 thereof, in this: 1st, on page 13 the jury are told in effect that there is no reconciliation of the testimony of the witnesses for the prosecution and the testimony of the defendant, and if they believe the testimony of the witnesses for the prosecution beyond a reasonable doubt, they should find the defendant guilty of murder, and thereby the jury were in effect told that if they believed the testimony of the witnesses for the prosecution, they must wholly disregard the testimony of the defendant, while on page 15, in submitting the case for the defendant, the jury are told that they must consider his testimony in connection with all other evidence in the case, and to give proper credit to all of the witnesses, and, if possible, reconcile all the evidence in the case with the presumption that each witness has intended to speak the truth, etc., which latter instruction is wholly inconsistent with the former unless the latter is limited solely to the witnesses for the Government, and is erroneous as matter of law.

IX.

The court erred on the instruction on the presumption of innocence, on page 13 of the instructions, in this: Said instruction fails to tell the jury that the presumption goes to each and every fact necessary to be proved in order to convict, and it is further erroneous in that it fails to instruct the jury that it is a substantial right to which he is entitled, and which they must give him the benefit throughout the case; but the jury are told merely that the presumption "should be permitted," etc., thus leaving it discretionary with the jury whether the defendant should be given the doubt or not.

And said instruction on the presumption of innocence is further erroneous in that the jury are told that such presumption is not intended to aid any one who was in fact guilty to escape, thereby leading the jury to believe that such presumption was invoked in this case for the purpose of aiding a guilty person to escape.

287 X.

The court erred in refusing the following instruction requested by the defendant:

"GENTLEMEN OF THE JURY: You are instructed that an accomplice in law means any one who participates in an offence, whether as principal or as accessory; and you are further instructed that an accessory is one who is guilty of an offence, not by committing the offence in person or as principal, but by being in some way guiltily concerned therein, as by advising or inciting another to commit a crime, or by concealing the principal offender or by concealing or aiding the guilty party, after having knowledge of his guilt, or helping him to escape punishment. And you are further instructed that you can not convict upon the uncorroborated testimony of an accomplice, and if you find and believe from the evidence that the witness Sheffler was an accomplice in the killing of the deceased Hurlin by the defendant, yet if you find there is no other evidence connecting the defendant with the commission of the crime, except the testimony of such accomplice, or unless the testimony of such accomplice as to the main and material facts constituting the crime are corroborated by other evidence, you can not find the defendant guilty; but such corroborating evidence must be something more than the mere showing that the crime has been committed, and must tend directly to connect the defendant with the act itself, and with each and every element that enters into the crime charged, and unless the testimony of such accomplice is so corroborated, you will acquit.

"Second. You are instructed that the testimony of one accomplice does not corroborate the testimony of another accomplice, and if you find and believe from the evidence that the witnesses for the Government, Charles Sheffler and Naomi Strong, were both accomplices in the killing of J. H. Hurlin, deceased, and that their testimony tending to prove the
288 defendant guilty of the crime charged in the indictment is not corroborated by any other evidence except their own, tending to connect the defendant with such killing, and the killing of the deceased in such manner as would make it a crime, then you must find the defendant not guilty.

"Third. You are instructed that a conviction in this case can not be had upon the testimony of an accomplice, unless such testimony be corroborated by such other evidence as tends to connect the defendant with the commission of the crime; and the corroboration is not sufficient if it merely show the commission of the crime and the circumstances of the commission, but such corroboration must go to the extent of corroborating the testimony of the accomplice upon each and every one of the material allegations in the indictment which are necessary to constitute the offence charged; and if you find and believe from the evidence that the witnesses, Charles Sheffler and Naomi Strong, were accomplices in the killing of J. H. Hurlin, if you find he was killed, and that their testimony tending to connect the defendant with such killing, and with such other facts as would make such killing a crime, is not corroborated by other competent evidence, you must acquit. And this corroboration must not be only to the fact of the killing of the deceased, but to the guilty intent and to all the facts and circumstances which would make such killing a crime under the instructions given you by the court."

XI.

The court erred in refusing the following instruction requested by the defendant:

GENTLEMEN OF THE JURY: In considering the testimony in this case, and in determining the credibility of the witnesses, it is your duty to weigh and judge the testimony in the light of the common knowledge and experience of mankind, and to apply such knowledge and experience to the facts testified to. The witnesses for the Government testify
289 that the defendant shot the deceased with a shotgun loaded with large shot, in the back of the head, from a distance of not exceeding four feet; that the head of the deceased, at the time the shot was fired, was immediately between the defendant and the witness, Naomi Strong, but that none of said shot struck said witness, but were all stopped by the head of deceased. It is further testified by the witnesses for the Government that the defendant immediately shot and wounded one R. L. Patterson with the other barrel of the shotgun similarly charged with large shot, and that at the moment of such shooting the said Patterson was at a distance of from four to six feet from the muzzle of the gun; that the charge of shot took effect in the body of said Patterson from about the lower point of the shoulder blade upward to a point in the left jaw underneath the ear, one coming out of the mouth and another coming out just on the right side of the nose.

"Most men in this country have more or less knowledge and experience of the effect of a shotgun discharged at close range, as to the extent of its penetration, and the extent to which the shot will scatter; and if, in the light of such knowledge and experience as you may have had, as well as the evidence in the case, you do not believe that the shooting of the deceased occurred in the manner testified to by the witnesses for the Government, you should acquit. Or, if you have a reasonable doubt as to whether such shooting occurred in that manner, you must give the defendant the benefit of that doubt and acquit him. And in determining whether the shooting of the deceased occurred in the manner claimed by the Government or not, it is your duty to consider all the matters testified to in that connection, and the probability or improbability of the woman escaping unhurt from the shot claimed to have been fired at the deceased's head, and the probability or improbability of the shot claimed to have been fired at Patterson scattering at the range to the extent testified to by the Government witnesses. And if the story as a whole seems improbable to you, it is sufficient to raise a reasonable doubt as to the defendant's guilt, and you must acquit him."

290 XII.

The court erred in refusing the following instruction requested by the defendant:

"In this case it has been testified to on behalf of the Government that the defendant made an attempt to escape while at St. Michaels. This was long after the offence with which he is charged is alleged to have been committed and some months after his arrest. Evidence of attempted escape, or flight, is admitted as tending to establish an inference of guilt

on the part of the accused in connection with other evidence. Alone, it is insufficient to establish such an inference at all. And in considering it in connection with other evidence, the jury are to carefully remember that there may have been other reasons leading up to such attempt to escape besides a consciousness of guilt, such as the distance to the place of trial, the natural fear that men have when charged with the commission of a grave crime, however innocent they may in fact be, the consciousness that witnesses are hostile, or other reasons that might be entirely consistent with innocence."

XIII.

The court erred in refusing the following instruction requested by the defendant:

"GENTLEMEN OF THE JURY: In judging of the defendant's right of self-defense, you must take into consideration the situation in which the defendant was placed, the circumstances surrounding him, his individual character, the apparent danger which threatened him, and if, in view of all these circumstances, you find and believe that the defendant honestly believed that it was necessary, in order to protect his own life or to save himself from great bodily harm, to shoot and kill the deceased, then you will find him not guilty, or if you have a reasonable doubt whether the defendant did not so act in self-defense, then you will acquit."

291 XIV.

The court erred in refusing the following instructions requested by the defendant:

"GENTLEMEN OF THE JURY: If you find and believe from the evidence that the defendant had reason to believe and did actually believe that the deceased, J. N. Hurlin, and one Robert Patterson were plotting to assassinate him, and at the time of such information came to him and up to the time of the death of deceased the defendant had no opportunity to appeal to the law for protection and was compelled to rely on his own individual resources to protect himself against such expected assassination, and if at the time of the killing he further believed and had reason to believe that deceased was about to attempt such assassination, pursuant to a previous understanding and plotting between the said Hurlin and Patterson, then he had a right to act upon the belief and to take such steps as in view of all the surrounding circumstances as appeared to him to reasonably necessary to protect himself and to save himself from such threatening attack; and if you find the defendant shot and killed the said J. H. Hurlin, believing and having a right to believe from his standpoint, in view of all the surrounding circumstances, that such shooting was necessary, then you will acquit.

"In judging of the reasonableness or unreasonableness of the defendant's conduct and belief, you must take into consideration the remoteness of the parties from civilization and all legal protection against any threatened injury, and not judge him as you would a person who would commit a similar act in a settled community, or where a person would not be thrown so entirely upon his own resources for his protection."

XV.

The court erred in refusing the following instruction requested by the defendant:

"GENTLEMEN OF THE JURY: You are instructed that the law
292 in this district recognizes the right of self-defense, and if you find and believe from the evidence that the defendant Homer Bird shot and killed the deceased J. H. Hurlin, and you further find that at the time of such killing the said J. H. Hurlin was in the act of securing a weapon under such circumstances as to cause a reasonably prudent man to believe, and the defendant did believe, that the purpose of procuring such weapon was to shoot and kill the defendant, then the defendant had a right to protect himself even to the extent of killing the said deceased; and in judging whether or not the defendant was justified in shooting the deceased, if you find that he did shoot and kill him, you are to take into consideration all the circumstances surrounding the parties at the time, and judge of the acts of the defendant from his standpoint; and in viewing it from his standpoint you must also consider all the facts and circumstances preceding and leading up to the fatal difficulty, including any information given to the said defendant; if you find any information was given him, and if in view of all the circumstances the defendant had reasonable ground to believe and did believe it was necessary to shoot the said J. H. Hurlin in order to save his life and to protect himself from great bodily harm and threatened injury at the hands of the said J. H. Hurlin, then you will acquit; or, if you have a reasonable doubt as to whether the defendant, in shooting the deceased, did not act in self-defense as above explained, then it is your duty to acquit."

XVI.

The court erred in refusing the following instructions requested by the defendant:

"The jury are instructed that the law presumes the defendant innocent in this case, and not guilty as charged in the indictment; and the presumption should continue and prevail in the minds of the jury until
293 they are satisfied by the evidence beyond all reasonable doubt, of the guilt of the defendant, and acting upon this presumption the jury should acquit the defendant, unless you are constrained to find him guilty by the evidence of witnesses of such guilt beyond a reasonable doubt. And this presumption of innocence is not a mere fiction, but a substantial right upon which you, upon your oaths as jurors, must act and be guided by, and continues with the defendant and guards him against a conviction until you are satisfied by the evidence beyond a reasonable doubt that he is guilty of the crime charged. And the court further instructs you that this presumption of innocence goes to every material fact charged in the indictment and necessary to be proved in order to constitute the crime charged."

XVII.

The court erred in refusing the following instruction requested by the defendant:

"You are instructed that if in this case a reasonable doubt of any fact necessary to convict the accused is raised in the minds of the jury

by the evidence or by any hypothesis reasonably consistent with the evidence, that doubt is decisive in favor of the prisoner's acquittal."

XVIII.

The court erred in refusing the following instruction requested by the defendant:

"You are instructed that the burden is upon the Government in this case to establish by credible evidence every material allegation in the indictment, to the satisfaction of the jury, beyond a reasonable doubt; and if you find and believe that the witnesses for the Government, testifying to any one or more of the material allegations charged in the indictment, are not credible witnesses, and because you are satisfied and believe that they are not credible witnesses you have a reasonable doubt of the guilt of the defendant, then you are instructed to acquit."

XIX.

The court erred in refusing the following instruction requested
294 by the defendant:

"The court instructs you that a reasonable doubt is that state of mind which, after a full comprehension and consideration of all the evidence, both for the Government and for the defence, and the consideration of the witnesses, their character, or interest they have in the result of this trial, their animosity towards the accused, or friendship toward him, and all other circumstances that might influence them, leaves the minds of the jury in that condition that they can not say that they feel an abiding faith amounting to moral certainty from the evidence in the case that the defendant is guilty of the crime laid in the indictment; and if you have such doubt, and your conviction of the defendant's guilt as laid in the indictment does not amount to a moral certainty, from the evidence in the case, of his guilt, then the court instructs you that you must acquit him."

XX.

The court erred in refusing the following instruction requested by the defendant:

"You are instructed that the jury are the sole judges of the facts in this case, and the credit to be given the respective witnesses who have testified; and in passing upon the credibility of such witnesses you have a right to take into consideration their prejudices, motives, or feelings of revenge, or any other motive which would induce them to desire the conviction or acquittal of the defendant, if any such prejudices, motives, or feelings of revenge appear to exist; and if you believe from the evidence that any witness or witnesses have knowingly or wilfully testified falsely to any material fact or point in this case, you are at liberty, unless their testimony is corroborated by other credible evidence, to disregard the testimony of such witness or witnesses in toto."

XXI.

The court erred in refusing the following instruction requested by the defendant:

295 "If you find and believe from the evidence in this case that any one or more of the witnesses for the Government are persons of base and immoral character, you should consider such fact or circumstances connected with their characters and the life you may find from the evidence that they lead, and if upon such consideration you have not an abiding faith, beyond all reasonable doubt, that such persons' testimony is true; and if you find that the crime laid in the indictment is not established beyond a reasonable doubt, except by the testimony of such witnesses, then you should acquit; that is to say, if you find it necessary to believe that such witnesses, if you find any such have testified in this case on behalf of the Government, in order to establish the guilt of the defendant by the evidence, and you have a reasonable doubt as to the truth of the testimony of such witness, then you must acquit."

XXII.

The court erred in refusing the following instruction requested by the defendant:

"The jury are instructed that the defendant is not on trial for the shooting of one R. L. Patterson, and you are not to consider any of the evidence tending to show that the defendant did shoot R. L. Patterson for the purpose of establishing the guilt of the defendant as to the commission of the crime charged in the indictment; nor are you to allow any such evidence to influence you in making up your verdict as to whether or not the defendant is guilty in this case, such evidence as to the shooting of R. L. Patterson being only admissable as part of the res gestæ."

XXIII.

The court erred in refusing the following instruction requested by the defendant:

"GENTLEMEN OF THE JURY: You are instructed that it is the duty of a party to a cause to produce all the evidence bearing upon the
296 issues to be tried that is material and reasonably attainable, so as to throw all the light possible upon the questions to be determined, and a failure to produce all such evidence raises a presumption against the party so failing, and if you find and believe from the evidence in this case that there are material witnesses which the Government could reasonably have produced on this trial, and whose testimony would have thrown additional light upon the circumstances of the killing of J. H. Hurlin, and the Government has failed to produce such witnesses, then you may take into consideration these circumstances, in connection with all the other evidence in the case, in determining whether or not the prosecution has made out a case showing the guilt of the defendant beyond all reasonable doubt; and if this circumstance—that is to say, the failure of the Government to produce all the evidence that it could reasonably have produced—if you find there has been such failure, taken

in connection with all the other evidence in the case, raises in your mind a reasonable doubt of the guilt of the defendant, then you will acquit."

XXIII.

The court erred in refusing the following instruction requested by the defendant:

"In this case, the defendant had a right to testify in his own behalf, and has so testified, and you have no right to disregard his testimony on the ground alone that he is the defendant and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proved guilty, and you should fairly and impartially consider his testimony, together with all the other evidence in the case, and if upon such consideration, taking into account his interest in the trial, together with the motives, if any, influencing the testimony of the other witnesses, you believe him innocent or have a reasonable doubt of his guilt, you should acquit."

MALONY & COBB,
Attys. for Defendant.

297 And thereafter and on, to wit, the 6th day of January, 1902, said motion came on to be heard, the defendant appearing in court in person and by counsel, and the Government appearing by the United States attorney, said motion was argued at length; whereupon the court, being fully advised in the premises, overruled the said motion, to which said ruling of the court in so overruling said motion for a new trial defendant by his counsel then and there excepted.

And thereafter, the court having fixed a day upon which sentence should be pronounced upon the said defendant, on the 16th day of January, A. D. 1902, the said defendant was brought into court at the time so appointed as aforesaid, and the court proceeded to pronounce judgment, that the defendant be taken by the United States marshal to Sitka, in the district of Alaska, and there confined until the 11th day of April, A. D. 1902, and that he then be taken to a suitable place theretofore prepared, as required by law, and there hanged by the neck until he was dead.

And now on this 24th day of February, A. D. 1902, one of the regular days of the same term of court and within the time allowed by the court, the defendant presents this his bill of exceptions, and prays that the same be allowed, signed, sealed, and made a part of the record herein, which is accordingly done in open court this third day of March, A. D. 1902.

M. C. BROWN,
Judge of the United States District Court for the District of Alaska, Div. No 1.

(Endorsed:) 1327. In the United States district court for Alaska, division No. 1, at Juneau. United States *vs.* Homer Bird. Bill of exceptions. Filed Mar. 3d, 1902. W. J. Hills, clerk.

298 UNITED STATES, PLAINTIFF, vs. HOMER BIRD, DEFENDANT. } No. 1327. Petition for writ of error.

Homer Bird, defendant in the above-entitled cause, feeling aggrieved by the verdict of the jury returned herein on the 25th day of December, 1901, and the judgment and sentence thereon rendered on the 16th day of January, 1902, whereby he was convicted and adjudged guilty of the crime of murder and the penalty of death imposed upon him by the sentence of the court, comes now and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and also that an order be made and entered suspending and superseding the execution of said judgment and sentence until the further orders of the said the honorable Supreme Court of the United States, and that all further proceedings in this court be suspended and stayed during the pendency of said writ of error; and your petitioner will ever pray, etc.

MALONY & COBB,
Attorneys for Defendant.

(Endorsed:) Original. No. 1327. In the United States district court for Alaska, division No. 1, at Juneau. United States, plaintiff, vs. Homer Bird, defendant. Petition for writ of error. Filed Mar. 13, 1902, W. J. Hills, clerk.

299 United States district court in and for the district of Alaska, division No. 1.

UNITED STATES vs. HOMER BIRD. } No. 1327. Assignment of errors.

Now comes the defendant, by his attorneys, and assigns the following errors, committed by the court on the trial of the above entitled and numbered cause, to wit:

First. The court erred in overruling the objection of the defendant to being placed upon his trial before the panel of jurors selected for the December, 1901, term of the United States district court for Alaska, division No. 1, because as shown by the record, said panel was not selected as required by law, in that the 300 names in the box from which said panel was drawn were not placed therein alternately, one by the clerk and one by the commissioner, as required by law.

Second. The court erred in overruling the defendant's motion to strike this cause from the docket and order the defendant discharged, thereby erroneously holding that the court had jurisdiction of the offence charged in the indictment and of the cause.

Third. The court erred in overruling the objections of the defendant to the witness called Naomi Strong being sworn and allowed to testify against him as shown by the defendant's third exception.

Fourth. The court erred in refusing to permit the witness Naomi Strong to answer the question whether she had not left the State of Indiana because she was charged with theft.

300 Fifth. The court erred in charging the jury as follows, to wit:

"GENTLEMEN OF THE JURY: The charge upon which the defendant, Homer Bird, is being tried in this case is for the crime of the murder of one J. H. Hurlin, alleged to have been perpetrated on the 27th day of September, in the year of our Lord one thousand eight hundred and ninety-eight. At the time the alleged crime was committed the district of Alaska was a district or territory belonging to the United States and under the exclusive jurisdiction of the General Government. As said offense is alleged to have been committed at a time prior to the enactment of a criminal code for Alaska the penalty of the law then in force is now in force in Alaska as to offenses committed prior to said enactment of a criminal code for Alaska, and the law then in force must be enforced and the trial of this case had thereunder.

"The act of Congress upon the subject does not define the crime in terms, the section of the statutes in force at the time the crime in this case is alleged to have been committed being as follows:

"'SEC. 5339. Every person who commits murder—

"'First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States.

"'Second. Or upon any of the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

"'Third. Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or sea, within or without the United States shall suffer death.'

"Murder was a crime at common law, and a legislative act which refers to the crime and fixes a penalty therefor is presumed to refer to the crime as understood and defined at common law. We must,
301 therefore, resort to the common law authorities for a definition of the offense you are now trying.

"It is said by Blackstone that the crime of murder is committed 'when a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the State, with malice aforethought either express or implied,' and I shall adopt the foregoing definition for the purposes of this case, and you will accept it as the law descriptive of this offense.

"Manslaughter may be defined under the United States Statutes as follows:

"'SEC. 5341. Every person who, within any of the places or upon any of the waters described in section fifty-three hundred and thirty-nine, unlawfully and wilfully, but without malice, strikes, stabs, wounds, or shoots at or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter.'

"The jury in this case may find the defendant guilty of manslaughter, according to the facts as you find them. If the jury are satisfied beyond a reasonable doubt that the defendant, Homer Bird, on or about the

time laid in the indictment, within the district of Alaska, wilfully and feloniously and with malice aforethought, either express or implied, killed the deceased, J. H. Hurlin, as charged in the indictment, then he is guilty of murder and you should so find."

Said instruction being erroneous for the reason, 1st, the court failed to define murder in the first and second degrees as provided in the Alaska Criminal Code.

2nd. The offense defined by the court has been abolished in Alaska; and, 3rd, the district court of Alaska, as now constituted, has no jurisdiction of the offence defined in said instructions.

302 Sixth. The court erred in instructing the jury as follows:

"In this connection you may consider whether the gun of the defendant was placed at a point near his bed as stated by the witnesses for the prosecution, and whether the defendant took his gun from the point where it was described to have been placed by the witnesses for the prosecution, and whether, without any act on the part of the deceased or either of those sitting near him, he maliciously from behind the backs of these men when no attack was made against him in any way, wilfully and maliciously shot the deceased, Hurlin, in the back and side of the head, thereby taking his life; or, whether the statement of the defendant is true, that a quarrel ensued between himself and Patterson while discussing their accounts; that blows passed between them, and that after hearing the witness Naomi Strong say, "They are getting their guns," if he did hear any such thing and if you so find—whether he sprang down to a point near the water barrel and there seized his gun and immediately raising the same shot Hurlin while he, the said Hurlin, was in the act of attempting to draw a gun from his sleeping bag; and if all of that was true as the defendant states, whether he was under the necessity of immediately shooting and killing the said Hurlin in order to protect his own life, or if, as the situation then appeared to him, such necessity of immediately shooting Hurlin in order to save his own life existed.

"If you find from the evidence that the statements of defendant,
303 Bird, in these respects are true, and that the statement of the witnesses of the prosecution are not true, and that the defendant, Bird, shot and killed the said Hurlin under circumstances as they then appeared to him necessary for the protection of his own life, then you should find him not guilty. But if you should further find that the statement of the defendant, Bird, is true as to the acts of the said Hurlin as to obtaining his own gun in the manner he described, and yet the apparent danger was not such as to make it necessary or apparently necessary for him to kill the deceased, Hurlin, without giving him any warning—if you find he gave him no warning—and without calling upon him, the said Hurlin, to desist in his efforts to obtain his gun, and that the defendant under such circumstances shot and killed the deceased, Hurlin, without apparent necessity therefor in order to preserve his own life, then you should find the defendant guilty of manslaughter at least.

"But in determining this matter under the evidence before you, you must consider that the situation of the parties at the time and all the surrounding circumstances, together with the testimony of the witnesses for the prosecution, as well as the evidence of the defendant."

Seventh. The court erred in instructing the jury as follows:

"Evidence has been offered of the escape of the defendant, or attempted escape, after arrest on the charge on which the defendant is now being tried. This evidence is admitted on the theory that the defendant is in fear of the consequences of his crime and is attempting to escape therefrom; in other words, that guilt may be inferred from the fact of escape from custody. The court instructs you that the infer-
304 ence that may be drawn from an escape is strong or slight according to the facts surrounding the party at the time. If a party is caught in the act of crime and speedily makes an attempt for liberty under desperate circumstance the inference of guilt would be strong, but if the attempt was made after many months of confinement and escape comparatively without danger then the inference of guilt to be drawn from an escape is slight; but whether the inference of guilt is strong or slight depends upon the conditions and circumstances surrounding the accused person at the time."

Eighth. The court erred in instructing the jury as follows:

"You are instructed that every person accused of crime is presumed to be innocent, and that presumption should be permitted to continue in your mind throughout the case until it is overcome by credible evidence which satisfies you of the guilt of the accused beyond a reasonable doubt. The rule which clothes every person accused of crime with the presumption of innocence and imposes upon the prosecution the burden of establishing his guilt beyond a reasonable doubt is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of the law intended to guard, so far as human agencies can, against the danger of an innocent person being unjustly punished."

Ninth. The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"GENTLEMEN OF THE JURY: You are instructed that an accomplice in law means any one who participates, whether as principal or as accessory; and you are further instructed that an accessory is one who
305 is *one who is* guilty of an offense, not by committing the offense in person or as principal, but by being in some way guiltily concerned therein, as by advising or inciting another to commit a crime, or by concealing the principal offender, or by concealing or aiding the guilty party after having knowledge of his guilt, or helping him to escape punishment. And you are further instructed that you can not convict upon the uncorroborated testimony of an accomplice, and if you find and believe from the evidence that the witness Sheffler was an accomplice in the killing of the deceased, Hurlin, by the defendant, yet if you find there is no other evidence concerning the defendant with the commission of the crime except the testimony of such accomplice, or unless the testimony of such accomplice as to the main and material facts constituting the crime are corroborated by other evidence, you can not find the defendant guilty; but such corroborating evidence must be something more than the mere showing that the crime has been committed and must tend directly to connect the defendant with the act itself and with each and every element that enters into the commission of the crime charged, and unless the testimony of such accomplice is so corroborated, you will acquit.

"Second. You are instructed that the testimony of one accomplice does

not corroborate the testimony of another accomplice, and if you find and believe from the evidence that the witnesses for the Government, Charles Sheffler and Naomi Strong, were both accomplices in the killing of J. H. Hurlin, the deceased, and that their testimony tending to prove the defendant guilty of the crime charged in the indictment is not corroborated by any other evidence, except their own, tending to connect the defendant with such killing, and the killing of the deceased in such manner as would make it a crime, then you must find the defendant not guilty.

306

"Third. You are instructed that a conviction in this case can not be had upon the testimony of an accomplice, unless such testimony be corroborated by such other evidence as tends to connect the defendant with the commission of the crime; and the corroboration is not sufficient if it merely shows the commission of the crime and the circumstances of the commission, but such corroboration must go to the extent of corroborating the testimony of the accomplice upon each and every one of the material allegations in the indictment which are necessary to constitute the offence charged, and if you find and believe from the evidence that the witnesses, Charles Sheffler and Naomi Strong, were accomplices in the killing of J. H. Hurlin, if you find he was killed, and that their testimony tending to connect the defendant with such killing, and with such other facts as would make such killing a crime, is not corroborated by other competent evidence, you must acquit. And this corroboration must not be only to the fact of the killing of the deceased, but to the guilty intent and to all the facts and circumstances which would make such killing a crime under the instructions given you by the court."

Eighth. The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"GENTLEMEN OF THE JURY: In considering the testimony in this case, and in determining the credibility of the witnesses, it is your duty to weigh and judge the testimony *of* the light of the common knowledge and experience of mankind and to apply such knowledge and experience to the facts testified to. The witnesses for the Government testified that the defendant shot the deceased with a shotgun loaded with large shot in the back of the head from a distance of not exceeding four feet; that the head of the deceased, at the time the shot was fired, was immediately between the defendant and the witness, Naomi Strong; but that none of the shot struck said witness, but were all stopped by the head of the deceased. It is further testified by the witnesses for the Government that the defendant immediately shot and wounded one R. L. Patterson with the other barrel of the shotgun similarly charged with large shot, and that at the moment of such shooting the said Patterson was at a distance of from four to six feet from the muzzle of the gun; that the charge of shot took effect on the body of said Patterson from about the lower point of the shoulder blade upwards to a point in the left jaw underneath the ear, one coming out of the mouth and another coming out just on the right side of the nose.

307

"Most men in this country have more or less knowledge and experience of the effect of a shotgun discharged at close range, as to the extent of its penetration, and the extent to which the shot will scatter; and if, in the light of such knowledge and experience as you may have had, as

well as the evidence in the case, you do not believe that the shooting of the deceased occurred in the manner testified to by the witnesses for the Government, you should acquit. Or if you have a reasonable doubt as to whether such shooting occurred in that manner, you must give the defendant the benefit of that doubt and acquit him. And in determining whether the shooting of the deceased occurred in the manner claimed by the Government or not, it is your duty to consider all the matters
308 testified to in that connection, and the probability or improbability of the shot claimed to have been fired at Patterson scattering at that range to the extent testified to by the Government witnesses. And if the story as a whole seems improbable to you, it is sufficient to raise a reasonable doubt as to the defendant's guilt, and you must acquit him."

Eleventh. The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"In this case it has been testified to, on behalf of the Government, that the defendant made an attempt to escape while at St. Michaels. This was long after the offence with which he is charged is alleged to have been committed and some months after his arrest. Evidence of attempted escape, or flight, is admitted as tending to establish an inference of guilt on the part of the accused, in connection with other evidence. Alone it is insufficient to establish such an inference at all. And, in considering it in connection with other evidence, the jury are to carefully remember that there may have been other reasons leading to such attempt to escape besides a consciousness of guilt, such as the distance to the place of trial, the natural fear that men have when charged with the commission of a grave crime, however innocent they may in fact be, the consciousness that witnesses are hostile, or other reasons that might be entirely consistent with innocence."

Twelfth. The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"GENTLEMEN OF THE JURY: In judging of the defendant's right of self-defense you must take into consideration the situation in which the defendant was placed, the circumstances surrounding him, his individual character, the apparent danger which threatened him; and if, in
309 view of all these circumstances, you find and believe that the defendant honestly believed that it was necessary, in order to protect his own life, or to save himself from great bodily harm, to shoot and kill the deceased, then you will find him not guilty, or if you have a reasonable doubt whether the defendant did not so act in self-defense, then you will acquit."

Thirteenth. The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"GENTLEMEN OF THE JURY: If you find and believe from the evidence that the defendant had reason to believe and did actually believe that the deceased, J. H. Hurlin, and one Robert Patterson were plotting to assassinate him, and at the time of such information came to him up to the time of the death of the deceased, the defendant had no opportunity to appeal to the law for protection and was compelled to rely on his own individual resources to protect himself against such expected assassination, and if at the time of the killing he further believed and had reason to believe that deceased was about to attempt such assassina-

tion, pursuant to a previous understanding and plotting between the said Hurlin and Patterson, then he had a right to act upon such belief and to take such steps as, in view of all the surrounding circumstances, as appeared to him to be reasonably necessary to protect himself, and to save himself from such threatening attack; and if you find that the defendant shot and killed the said Hurlin, believing and having a right to believe from his standpoint, in view of all the surrounding circumstances, that such shooting was necessary, then you will acquit.

"In judging of the reasonableness or unreasonableness of the defendant's conduct and belief, you must take into consideration the remoteness of the parties from civilization and all legal protection against any
310 threatened injury, and not judge him as you would a person who would commit a similar act in a settled community, or where a person would not be thrown so entirely upon his own resources for his protection."

Fourteenth. The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"The jury are instructed that the law presumes the defendant innocent in this case and not guilty, as charged in the indictment, and the presumption should continue and prevail in the minds of the jury until they are satisfied by the evidence, beyond all reasonable doubt, of the guilt of the defendant, unless you are constrained to find him guilty by the evidence of witnesses of such guilt beyond a reasonable doubt; and this presumption of innocence is not a mere fiction, but a substantial right upon which you, upon your oaths as jurors, must act and be guided by, and continues with the defendant and guards him against a conviction until you are satisfied by the evidence beyond a reasonable doubt that he is guilty of the crime charged. And the court further instructs you that this presumption of innocence goes to every material fact charged in the indictment and necessary to be proved in order to constitute the crime charged."

Fifteenth. The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"You are instructed that in this case, if a reasonable doubt of any fact necessary to convict the accused is raised in the minds of the jury by the evidence or by any hypothesis reasonably consistent with the evidence, that doubt is decisive in favor of the prisoner's acquittal."

Sixteenth. The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"The jury are instructed that the defendant is not on trial for the shooting of one R. L. Patterson, and you are not to consider any
311 of the evidence tending to show that the defendant did shoot R. L. Patterson for the purpose of establishing the guilt of the defendant as to the commission of the crime charged in the indictment, nor are you to allow any such evidence to influence you in making your verdict as to whether or not the defendant is guilty in this case, such evidence as to the shooting of R. L. Patterson being only admissible as part of the res gestæ."

Seventeenth. The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"GENTLEMEN OF THE JURY: You are instructed that it is the duty

of a party to cause to produce all the evidence bearing upon the issues to be tried that is material and reasonably attainable, so as to throw all the light possible upon the questions to be determined, and a failure to produce all such evidence raises a presumption against the party so failing; and if you find and believe from the evidence in this case that there are material witnesses which *which* the Government could have reasonably produced on this trial, and whose testimony would have thrown additional light upon the circumstances of the killing of J. H. Hurlin, and the Government has failed to produce such witnesses, then you may take into consideration these circumstances, in connection with all the other evidence in the case, in determining whether or not the prosecution had made out a case showing the guilt of the defendant beyond all reasonable doubt; and if this circumstance—that is to say, the failure of the Government to produce all the evidence that it could reasonably have produced—if you find there has been such failure, taken in connection with all other evidence in the case, raises in your mind a reasonable doubt of the guilt of the defendant, then you will acquit."

312 Eighteenth. The court erred in overruling and denying the motion of the defendant in arrest of judgment.

Nineteenth. The court erred in overruling and denying the defendant's motion for a new trial.

And for the said errors and others manifest of record herein, the defendant prays that said judgment and sentence be reversed, and the defendant discharged, or for such other orders as the court may deem proper.

MALONY & COBB,
Attorneys for Defendant.

(Indorsed:) 1327. In the United States district court for Alaska, Division No. 1, at Juneau. United States *vs.* Homer Bird. Assignment of errors. Filed Mar. 13, 1902. W. J. Hills, clerk.

313 At a stated term, to wit, the December term, 1901, of the United States district court for Alaska, Division No. 1, held at the court room in Juneau, commencing on the 2nd day of December, 1901. Present the Honorable M. C. Brown, district judge.

UNITED STATES
vs. } No. 1327.
HOMER BIRD.

Upon motion of Malony & Cobb, attorneys for defendant, and upon filing a petition for writ of error and assignment of errors, it is ordered that a writ of error be, and the same is hereby, allowed, to have reviewed in the honorable the Supreme Court of the United States the judgment heretofore entered herein, and that all proceedings herein be stayed and superseded pending the determination of said writ of error in the said Supreme Court.

Dated March 13th, 1902.

M. C. BROWN, *Judge.*

(Endorsed:) Original. No. 1327. In the United States district court for Alaska, Division No. 1, at Juneau. United States, plaintiff, *vs.*

Homer Bird, defendant. Order allowing writ of error. Filed Mar. 13, 1902. W. J. Hills, clerk.

314 UNITED STATES OF AMERICA,
District of Alaska, Division No. 1, ss:

I, W. J. Hills, clerk of the United States district court for the district of Alaska, division No. 1, do hereby certify that the above and foregoing and hereunto annexed 313 pages are a full, true, and correct transcript of the records and files and all of the proceedings had in the thereinmentioned case of the United States vs. Homer Bird, as the same remains of record and on file in my office and in accordance with the command in the writ of error in said cause allowed.

I further certify that this transcript was prepared in accordance with order of the above court and at the expense of the United States and that no charge has been made therefor.

In testimony whereof I have hereunto set my hand and caused the seal of the court to be hereunto affixed at the town of Juneau, in said district, on the 29th day of March, 1902.

[SEAL.] W. J. HILLS,
Clerk U. S. Dist. Court for District of Alaska, Division No. 1.

315 In the United States district court for Alaska, division No. 1, at Juneau.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable M. C. Brown, judge of the United States district court in and for the district of Alaska, division No. 1—Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said district court before you, between the United States of America, plaintiff, and Homer Bird, defendant, a manifest error hath happened, to the great prejudice of the said defendant, Homer Bird, as is stated and appears by the petition herein:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at the city of Washington, D. C., together with this writ, so as to have the same at the said place before said court, on the — day of May, 1902, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct those error' what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13th day of March, 1902.

Attest my hand and the seal of the United States district court for the district of Alaska, at the clerk's office at Juneau, Alaska, on the day and year above written.

[SEAL.] W. J. HILLS,
Clerk of the United States District Court in and for the District of Alaska, Division No. 1.

316 Allowed this 13th day of March, 1902.

MELVILLE C. BROWN,
Judge of the United States District Court in and for the District of Alaska.

317 (Indorsed:) Original. No. 1327. In the United States district court for Alaska, division No. 1, at Juneau. United States, plaintiff, vs. Homer Bird, defendant. Writ of error. Filed Mar. 13, 1902. W. J. Hills, clerk. Malony & Cobb, attorneys for deft., office Juneau, Alaska.

318 In the United States district court for Alaska, division No. 1, at Juneau.

HOMER BIRD, PLAINTIFF IN ERROR,
vs.
UNITED STATES, DEFENDANT IN ERROR. } Citation in error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America and the district attorney for the district of Alaska, division No. 1—Greeting:

You are hereby cited and admonished that the Supreme Court of the United States, at Washington, District of Columbia, within sixty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the United States district court for Alaska, division No. 1, at Juneau, wherein Homer Bird is plaintiff in error and the United States are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of March, A. D. 1902, and of the independence of the United States the one hundred and twenty-sixth.

[SEAL.] M. C. BROWN,
District Judge for Alaska, Division No. 1.

Attest: W. J. HILLS, *Clerk.*

Service of the above and foregoing citation in error is hereby admitted to have been duly and legally made in the district of Alaska this 29th day of March, 1902.

ROBT. A. FRIEDRICH,
U. S. Attorney.

319 (Indorsed:) Original. No. . In the United States district court for Alaska, division No. 1, at Juneau. Homer Bird, plaintiff in error, vs. United States, defendant in error. Citation in error filed Mar. 29, 1902. W. J. Hills, clerk. Malony & Cobb, attorneys for plaintiff in error, office Juneau, Alaska.

(Indorsement on cover:) File No. 18498. Alaska D. C. U. S. Term No., 306. Homer Bird, plaintiff in error, vs. The United States. Filed April 14th, 1902.

FILED
SEP 22 19
JAMES H. McKENNEY
C

No. 306.

Supreme Court of the United States

October Term, 1902.

Filed Sept. 22, 1902.

HOMER BIRD, *Plaintiff in Error*

vs.

THE UNITED STATES.

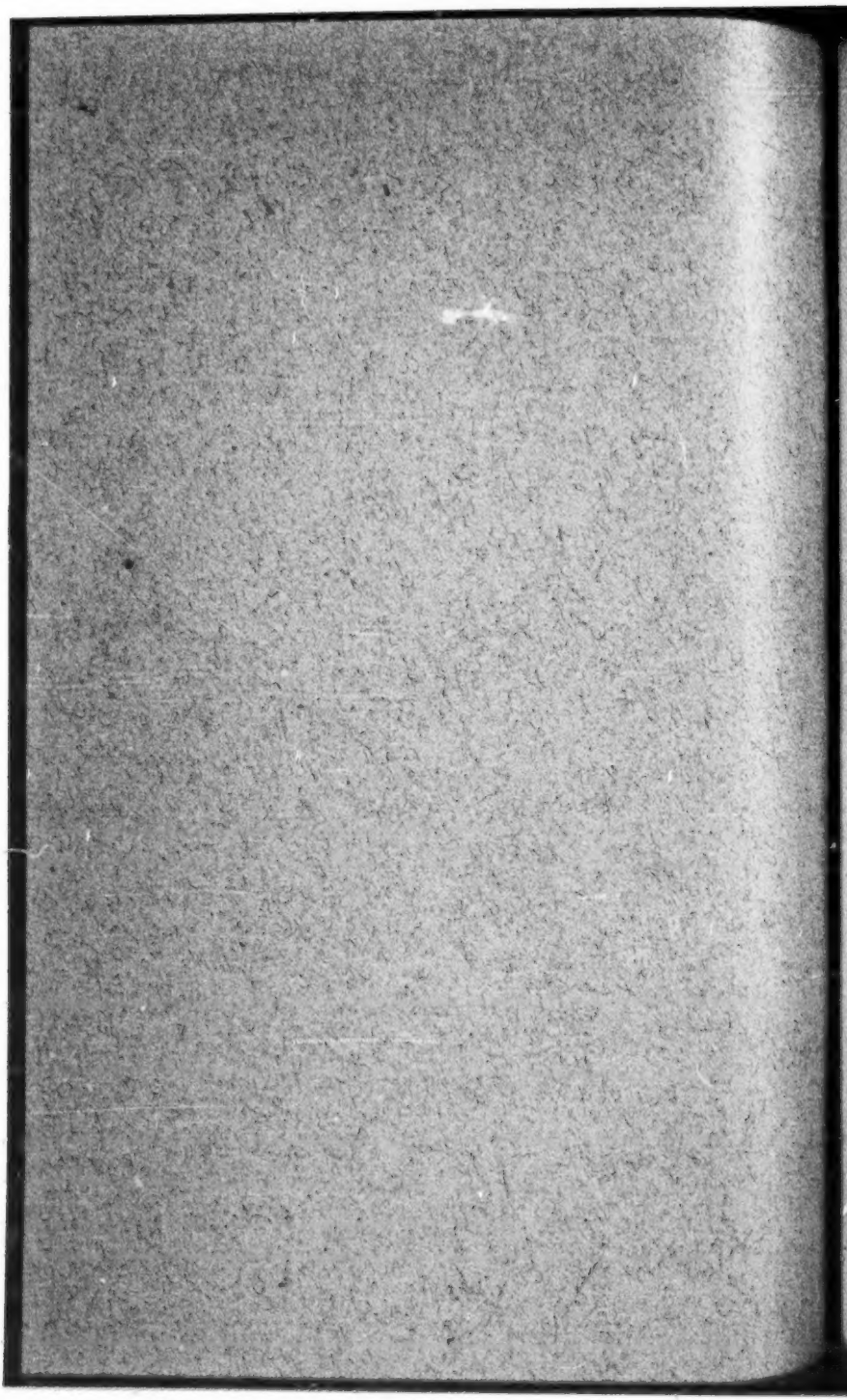
In Error to the District Court of the United States for the District of Alaska, Division No. 1.

BRIEF OF THE PLAINTIFF IN ERROR

MALONY & COBB
Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

DAILY RECORD-MINER, JUNEAU.



No. 306.

Supreme Court of the United States

October Term, 1902.

HOMER BIRD, *Pliintiff in Error*

vs.

THE UNITED STATES.

In Error to the District Court of tha United States for the District of Alaska, Division No. 1.

BRIEF OF THE PLAINTIFF IN ERROR

MALONY & COBB
Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

On the 9th day of November, 1899, the Grand Jury of Alaska returned an indictment against Homer

Bird, the plaintiff in error, charging him with the murder of one J. H. Hurlin, alleged to have been committed on the 27th day of September, 1898, at a point on the Yukon river about 600 miles above its mouth (Rec. pp. 1 and 2). The defendant was, tried, convicted, and December 13, 1899, sentenced to be hanged. A Writ of Error was sued out from this court, which, on February 25, 1901, reversed the judgment of the lower court, and remanded the cause, (Rec. pp. 3 and 4), (180 U. S. 356.)

The mandate was received by the Clerk of the U. S. District Court for Alaska Division No. 1, and that court assuming jurisdiction of the case, the defendant was again tried, convicted, and the death penalty imposed, (Rec. pp. 8 to 13). A Bill of Exceptions was saved (Rec. pp. 13) to 169, errors assigned, (Rec. pp. 170 to 177), a writ of error sued out, (Rec. p. 178), and the cause is now here again presented for correction and revision.

The facts developed on the second trial are substantialy the same as on the first, and which are clearly and succinctly set forth by this court in the opinion delivered, (180 U. S. 356.) We will therefore refrain from a repetition of the facts at this time. The errors assigned raise the following questions:

1st. Had the United States District Court for Alaska, Division No. 1, jurisdiction of the cause, and of the crime charged?

2nd. Did the court err in compelling the defend-

ant to go to trial before a jury had been selected according to law?

3rd. Is a witness competent to testify against a defendant on trial on a capital charge, whose true name, though demanded, has never been furnished to him on the list of witnesses served?

4th. Errors in instructions given the jury and in refusing instructions requested which will be considered in their order?

The most important question, and the one we therefore present first, is as to the jurisdiction of the court. The question is raised by the

Second, Fifth and *Eighteenth Assignments of Error.* (Rec. pp. 170, 171 and 177.)

The Bill of Exceptions shows that after the cause was remanded by this court, and was called for trial in the court below, the defendant moved the court to strike the cause from the docket and order the defendant discharged: First, because the court had no jurisdiction of the crime charged. Second, because the court had no jurisdiction of the case; but the court denied the motion, and the defendant excepted, (Rec. p. 14.) This ruling is complained of in the second assignment, (Rec. p. 170.) The court instructed the jury on the law of homicide as contained in the Revised Statutes of the United States, sections 5339 and 5341, and as defined at common law to which the defendant excepted, (Rec. pp. 47 and 48), and this is complained of in the Fifth assignment of error, (Rec. p. 171.) After the verdict was returned,

the defendant made a motion in arrest of judgment on the following grounds: First, because there has never been any plea entered in this court by the defendant, the only plea ever made by him being in the District Court for Alaska, established by the Act of Congress of May 17 1884, which was abolished by the Act of Congress of June 6, 1900.

Second, because the court has no jurisdiction of this cause, the indictment hereinhaving been returned into the District Court for Alaska established by the Act of Congress of May 17, 1884, and not into this court, and there is no law conferring upon this court jurisdiction oqer indictments returned into said court.

Third, because this court has no jurisdiction of the offence charged in the indictment herein, in this: The said indictment charges an offence under Section 5339 of the Revised Statutes of the United States, which this court has no jurisdiction of crimes except as defined in the Criminal Code for Alaska. This motion the court overruled and the defendant excepted, (Rec. pp 159, 160), and this ruling is complained of in the 18th assignment of error, (Rec. p. 177.)

In order to clearly understand the points raised it is necessary to examine the several acts of congress relating to the civil government and the courts in Alaska. The Act of Congress of May 17, 1884, established the first court in Alaska under American authority. That act, (23 Stat. L. Chap. 53), made Alaska a civil and judicial district; by Section 3 a dis-

trict court was established "for said district, with the "civil and criminal jurisdiction of District Courts of "the United States, and the civil and criminal juris-"diction of District Courts of the United State exer-"cising the jurisdiction of circuit courts, and such "other jurisdiction not inconsistent with this act, as "may be established by law." One District Judge was provided for the whole district whose residence was to be therein, and he was to hold at least two terms of court each year, one ot Sitka, and one at Wrangel in May and November, and special terms at such times and places as he saw fit. Subsequent sections provided for a clerk, four commissioners and a marshal, all appointed by the President. By Section 7 the general laws of Oregon, not in conflict with the act or the laws of the United States and not inapplicable, were extended to and made the laws of the District.

This act, together with the laws of Oregon, where the court could find any "not inapplicable," constituted the code for Alaska from 1884 to 1900. It was while this act was in force that the indictment herein was returned. The indictment, therefore, was drawn under the provisions of Section 5339 of the Revised Statutes of the United States, and alleges the jurisdictional fact that the locus of the alleged crime was in a place "under the exclusive jurisdiction of the United States." (Rec.p. 1.) Jurisdiction to try the cause was found in the clause conferring upon that court the "criminal" jurisdiction of United States District Courts ex-

ercising the jurisdiction of Circuit Courts."

On March 3rd, 1899, Congress enacted a criminal code and code of criminal procedure for Alaska entitled, "an act to define and punish crimes in the District of Alaska, and to provide a code of criminal procedure for said District. (Parts one and two, Carter's Alaska Code.) This act went into effect July 1, 1899, and contains a complete criminal code, and a complete code of criminal procedure. Criminal homicide is therein defined and divided into murder in the first and second degree and manslaughter, (chap. 2, p. 2), the definition as well as division differing from that found in the Revised Statutes, being taken verbatim from the Ohio Code. This act, however, if it stood alone, would not have caused any trouble since it contained a saving clause, (Sec. 219 of part one)preventing it from affecting or applying to prosecutions pending or that might be brought for offences committed prior to its passage. In other words, while the offense of murder as denounced by the Revised Statutes was abolished, the jurisdiction of the court to try for that offense was retained in the particular cases named.

But on June 6, 1900, Congress passed another act for Alaska entitled, "An act making further provision for a civil government for Alaska, and for other purposes." This act is divided into three titles: a Political Code, Code of Civil Procedure, and Civil Code, (Carter's Code, parts III, IV and V.) It covers completely every subject of legislation treated of in the act of May 17, 1884. A governor is provided for

with a salary of $4,000 per annum instead of $3,000, as under the old law; Section 4, (Id. p. 132), provides "a district court for the district, which shall be a "court of general jurisdiction in civil, criminal, "equity and admiralty causes; and three district "judges shall be appointed for the district, who shall "during their terms of office, reside in the divisions "of the district to which they may be respectively "assigned by the President.

"The court shall consist of three divisions. The "judge designated to preside over the division num- "bered one shall, during his term of office reside at "Juneau, and shall hold at least four terms of court "in the district each year, two at Juneau and two at "Skagway, and the judge shall, as near January 1st "as practicable, designate the time of holding the "terms during the current year.

"The Judge designated to preside over division "numbered two shall reside at St. Michaels during his "term of office, and shall hold at least one term of "court each year at St. Michaels, in the district, be- "ginning the third Monday in June.

"The judge designated to preside over division "numbered three shall reside at Eagle City during "his term of office, and shall hold at least one term "of court each year at Eagle City in the district, be- "ginning the first Monday in July.

Section 5 declares the jurisdiction of each division of the court to extend over the whole district, and provides for a change of venue from one division or

place to another. The act further empowers the judges to appoint their own clerks, commissioners, etc.

Section 10 provides that the "judges, (and other "officers) provided for in this act shall be appointed "by the president, by and with the advice and consent of the senate," etc., and a salary of $5,000 is provided instead of $3,000 as under the old law.

Section 25 provides that "The officers properly "qualified and actually discharging official duties in "the district at the time of the approval of this act may "continue to act in their respective official capacities "until the expiration of the term for which they were "respectively appointed unless sooner removed."

This section was evidently inserted by Congress to prevent a complete vacancy in all offices in Alaska between the passage of the act and the appointment of the new officers; as a matter of fact, on the very day the act was approved a full complement of officers was appointed under it.

Section 368 of part V (p. 432) provides, "No "person shall be deprived of any existing legal right "or remedy by reason of the passage of this act, and "all *Civil* actions or proceedings commenced in the "courts of the district before it within sixty days "after the approval of this act may be prosecuted to "final judgment under the law now in force in the "district or under this act. All acts and parts of "acts in conflict with the provisions of this act are hereby repealed.

An examination of the several acts mentioned, in the light of the foregoing provisions, leads, we think, to the following necessary deductions:

First: That the act of June 6, 1900, both by express enactment and by necessary implication, entirely repealed and superceded the act of May 17, 1884.

Second: That the district court for Alaska created by the act of May 17, 1884, was abolished by the act of June 6, 1900, and an entirely new court created.

Third: That in the absence of a provision in the latter act, transferring criminal causes pending in the old court to the new, the latter had no jurisdiction of indictments returned into the old court.

Fourth: A statute conferring upon a court "general" jurisdiction in criminal matters, must be construed to refer to, and to be limited by the code of criminal law enacted for the territory, and does not include jurisdiction of any offense not embodied in the code.

Fifth: The district court for Alaska, division No. 1, has no jurisdiction to try an indictment for murder drawn under section 5339 of the Rev. Stat. of the U. S., but can only try such offense as defined by the criminal code for Alaska.

We will discuss these propositions in their order.

First: The act of June 6, 1900, expressly repeals all acts and parts of acts in conflict with it. It does not purport to be an amendment of the act of 1884. Besides it covers the whole field of legislation embraced in the act of 1884. Under the authority of United States vs. Tynen, 11 Wall. 88; and of Murphy vs. Utter, decided by this court May 19, 1902, 22, Sup. Ct. Rep. 776; the act of May 17, 1884, therefore ceased to have any force or effect on June 6, 1900.

Second: If the first proposition is established, the second follows as a corrollary. This is in accord with the views of Circuit Court of Appeals for the Ninth Circuit. In the case of Tornanses vs. Melsing, 106 Fed. , at page 779, that court says: "The complaint * * * is entitled in the district court of the United States for the District of Alaska, which court was abolished by the act of June 6, 1900. That complaint, however, appears to have been filed in the District Court for the District of Alaska, Second Division, created by the last mentioned act of Congress." The congress evidently considered that they were abolishing the old court and creating a new, or the proviso, continuing in office the then incumbents, would not have been inserted, as it was in section 25 of Title I. of the act June 6th, 1900, quoted above. The Executive considered that the old court was abolished and a new court created, for on June 6th, 1900, judges were appointed to fill the three judgeships created that day. (See. 101 Fed. page VII as well as archives of the Attorney General's office). The three

departments of the government therefore seem to concur in the conclusion we have drawn.

Third: There are four elements that enter into the question of the jurisdiction of courts in criminal causes:

(a) The cause must be one which the law making power has authorized and empowered the court to hear and determine.

(b) It must have jurisdiction of the defendant.

(c) The action of the court must be invoked by some appropriate pleading presented to it and calling its jurisdiction into action.

(d) There must be a pleading on the part of the defendant, either made by him, or by the court for him.

These propositions, we think, elementary. Only the last two, however, need be noticed in this connection.

If a court should assume to try a man for his life or liberty without any pleading (indictment or information), specifying the crime charged, and legally invoking the action of the court, its judgment would of course be void. This goes without saying. Is it not then equally true that one court cannot try a man for his life on an indictment presented in another court, and which has never been legally removed into the court so trying him? To illustrate: Suppose an indictment to be returned into one of the Superior Courts of the State of Washington, the Circuit Court of the United States for the State of Washington could

not try the defendant for the offense charged, even though that offense should be one over which the Circuit Court would have jurisdiction under appropriate proceedings. Yet that is substantially what transpired in the case at bar. The indictment against the defendant, Bird, was returned into the United States District Court for Alaska, established by the act of May 17th, 1884. That Court was abolished by the act of June 6th, 1900, and a new court established. There was no transfer of pending *criminal* cases to the new court by the latter act, no order of the old court transferring the cause to the new and no authority of law for making such transfer. There is no provision of law making the clerk of the District Court for Alaska, Division No. 1, the legal custodian of the records and files of the old court. The records and files of the old court are not made records and files of the new court. In short, the government cannot put its finger upon a syllable of law authorizing the District Court for Alaska, Division No. 1, to try this case, and pronounce the judgment complained of.

Questions identical in principle with the one here presented have been often decided by this court. Such questions have arisen repeatedly, when new states have been admitted into the Union, the territorial courts abolished and new State and Federal courts organized.

In these cases it has always been held that unless a provision was made for the transfer of pending causes to the new courts the jurisdiction failed. (See McNulty vs. Batty, 10 How. 72, Railroad Co. vs.

Grant 98 U. S. 104. Ames vs. Railroad Co. 4 Dill 25 Fed. Cas. 324).

Freeborn vs. Smith 2 Wall. 160, arose in the territorial court of Nevada. A judgment for the plaintiff was removed to the Supreme Court of the territory which affirmed the judgment. The case was then taken on writ of error to the Supreme Court of the United States. Pending the writ, the act of congress under which it was brought and the territorial government were superseded by the admission of Nevada as a state. No provision of law was made for the disposition of cases pending here on writ of error from the Supreme Court of of Nevada. A motion to dismiss was made and the court postponed the hearing until the necessary legislation was passed by congress. In discussing the omission in the act as first passed, the Court says: "By this omission cases like the "present were left in a very anomalous situation. "The state could not, proprio vigore, transfer to its "courts the jurisdiction of a case whose record was "transmitted to this court without the concurrent "action of Congress. Until such action was taken "the case was suspended and the parties left to "renew their litigation in the state courts." And further along, speaking of the act curing the omission, the court says: "The passage of the act now in "question was absolutely necessary to remove an "impediment in the way of any legal proceeding in the case."

In the case at bar the impediment has not been removed. Further proceeding *was* taken, but surely

it was not *legal*. Again, in Moore vs. U. S., 85 Fed. 465, the defendant was indicted in the Territory of Utah, under section 3 of the act of July 2, 1890, which declares illegal "every combination in restraint " of trade or commerce in any territory." While the case was pending Utah became a state. While by appropriate legislation every other character of case pending in the territorial courts was transferred to the new courts, either state or federal, yet there was no provision of law "continuing the act of July 2, " now under consideration, in force in Utah after " the admission of the state; neither is there any " statute which in terms provides for the transfer to, " and trial of cases arising under that act in the " circuit court for that district." The case however was transferred to and tried in the circuit court and the defendant convicted. The circuit court of appeals for the 8th circuit held that the lower court was without jurisdiction. "The indictment," says the court, "was returned by a territorial grand jury and " filed in a territorial court, during the existence of a " territorial form of government. If, therefore, the " circuit court possessed the power and authority to " try this case, it was because of the existence of leg- " islation continuing the provisions of the statute de- " fining the offense set out in the indictment in force " after the admission of the state, and especially con- " ferring upon the circuit court for that district jur- " isdiction in such cases." So in this case. The indictment was returned into the United States District Court for Alaska during the existence of that

(the old) court and the old government. If the District Court for Alaska, Division No. 1, had power and authority to try it, it must be because of legislation specially conferring upon that court jurisdiction in such cases. Such legislation, as we have seen is wholly wanting. *Civil* cases, pending in the courts of the district, are specially provided for, but nowhere is the new court given jurisdiction over criminal cases arising under the old law and pending in the old court.

Another fatal objection to the judgment is the absence of any arraignment of, or plea by the defendant in the record. None was made in the lower court. It is true, the record on the former appeal shows that the defendant was arraigned and plead not guilty. But that arraignment and plea were entered in the old court. The records and files of the old court are no where made records and files of the new. So far as the record of the court pronouncing the judgment shows, there was no case pending, no issue to be tried. An indictment once filed in an abolished court is read to the jury, and without any plea on behalf of the defendant he is tried and convicted.

Fourth and Fifth: The District Court for Alaska, Division No. 1, had no jurisdiction of the offense charged in this indictment. Where general jurisdiction in criminal cases is conferred upon a court, the term is construed in the light of, and limited by, the crimes defined in the criminal code for the political division over which the court presides. It cannot no

more try for offenses without that code than it can for offenses committed without that territory. These propositions are elementary. Now the crime charged in this indictment is murder under the Revised Statutes of the United States and as defined by the common law. The indictment speaks for itself; and the court so told the jury (Rec. p. 147–8) Whence did the court derive the power and authority assumed? Not from the Alaska code. Not from any Act of Congress. Merely because the old court was given the jurisdiction of "United States District courts exercising the jurisdiction of circuit courts," the lower court in this case assumed that it had a similar jurisdiction. True, Congress might have conferred upon it that power, but it did not do so. As the law stands the courts of Alaska have no more jurisdiction to try the defendant on the indictment herein than they would have to try him for an offense charged to have been committed prior to the Russian cession.

And here we would close this brief, content to rest the decision on the jurisdictional question alone, were the case one of less transcendant importance to the defendant. But there are other errors assigned, which we believe would require a reversal in any event, and the defendant's life being at stake, we do not feel at liberty to omit a full presentation of them.

Following the order indicated in our opening statement we will next present the

FIRST ASSIGNMENT OF ERROR.

This assignment complains of the action of the trial court in requiring the defendant to go

to trial with and select his jury from the regular panel, because the three hundred names in the jury box, from which said panel was drawn, were not placed in said box alternately, one by the clerk and one by the jury commissioner, as required by law. (R. p. 170).

The bill of exceptions shows (R. pp. 13 and 14) that one C. D. Rogers, a person properly qualified, was properly appointed a jury commissioner to select the jury for the December term of court; that the three hundred names from which the jury was drawn were placed in the box by the clerk "in connection with C. D. Rogers." The defendant objected to being placed on trial before this jury because not selected as required by law; the court overruled the objection and the defendant excepted. This we think was error.

The Alaska code of criminal procedure, sec. 119, provides that "jurors for * * Alaska * * shall be selected and summoned in the manner prescribed by the laws of the United States with respect to the United States district and circuit courts." The latter require the jury commissioner and the clerk to place three hundred names in the box alternately, one by the clerk and one by the commissioner (Sup. R. S. U. S., Vol. I, p. 170). And the record should show that this was done. In this case it was not done. The clerk placed the names in the box "in connection with" the commissioner. They may have all been placed in the box by the clerk, with the commissioner standing by; they may have baen placed

in the box, one-half by the clerk at a time, and one-half by the commissioner. We are left to infer what was done. But if the selection was properly made, surely the government could have shown the fact and had the record corrected. By standing upon the record as made in the face of the objection, the presumption obtains that the names were not placed in the box alternately as required by law. At least the defendant, whose life has been declared forfeited to the law, has the right to insist that the law be strictly complied with. He had a right to a trial by a jury selected as the law prescribed, and when he came into court and found that the record failed to show such a jury, and he objected, it surely devolved upon the government to show a compliance with the law. This it failed to do

In Ry. Co. vs. Shane, 157 U. S., 348, this court reversed a civil case from the Indian Territory because of a failure to select a jury in a manner prescribed by the local statute. The principle controlling that decision, we think, fatal to this case.

THIRD ASSIGNMENT OF ERROR.

This assignment (R. p. 170) questions the action of the court in permitting the witness, Naomi Strong, to testify in the case. The record shows that the case was first set for trial Dec. 17 (top p. 6). On that day, after overruling a motion for continuance, the court ruled that the trial must proceed and a juror was called; whereupon the defendant objected to proceeding further at that time because no list of the jury had been furnished him and no list of the witnesses

to be used against him. The court thereupon postponed the trial two days and required the government to serve the defendant with a list of the jury and a list of the witnesses (R. pp. 8 and 9). The bill of exceptions shows (R. pp. 73 and 74) that on the list of witnesses served was the name Naomi Strong; that when this witness was called the jury, at the request o the defendant, was withdrawn, the witness eworn to answer questions to be then propounded, but not sworn in the cause. She was then questioned as to her name and it transpired that her maiden name was Naomi Strong; that she had been married and divorced; that after her divorce she again went by her maiden name; she refused to divulge her true name and the court refused to compel her to divulge it. Thereupon the defendant objected to the witness being allowed to testify against him because her true name had never been furnished him on the list of witnesses furnished him, but the court overruled the objection; the defendant excepted, and the witness was sworn and testified.

It is conceded that this is not necessary in the courts of Alaska as now established. But the court throughout the trial proceeded on the theory that it was exercising "the jurisdiction of United States District Courts exercising the jurisdiction of Circuit Courts," both as to the crime charged and the procedure governing the trial. If it was in error in that, the whole proceeding is necessarily void—the court was exercising a power it did not possess. If it was right in the theory followed it should have adhered

to it throughout—not have followed the federal practice where it was against the defendant and then the Alaska practice where it was equally against him. Now as to the law: This court is of course familiar with the requirements of the Revised Statutes in capital cases. A list of the names of the witnesses, with their residences, must be served upon the defendant two days before the trial (Rev. Stat., sec. 1033). If this is not done, and objection be made to the witness such witness whose name is not furnished cannot testify (Logan vs. United States, 144 U. S., 263). The question here is, is this requirement complied with by furnishing a mere assumed name? The purpose of the statute is evidently to give the defendant an opportunity to ascertain something of the antecedents of the witnesses and the existence of facts, if any, which would render them incompetent or otherwise affect their testimony. This purpose would often be defeated if an assumed instead of the true name was furnished. An assumed name would often mean no more than a number or the traditional John Doe. In this case the District Attorney, for some reason, was extremely anxious to keep the real name of this woman a secret. That name the defendant was entitled to have two days before the trial. He seasonably demanded it and was given a mere assumed name; he objected to her being allowed to testify, and we think the objection should have been sustained.

An understanding of the other errors we shall present, requires a brief statement of the evidence

and the issues raised thereby for the jury. We condense, stating only the essentials:

In the spring of 1898, five persons, the defendant, Chas. Scheffler, a woman known as Naomi Strong, R. L. Patterson and J. H. Hurlin, left New Orleans, La., for the Yukon to prospect for gold. They had agreed that each of the men should contribute $500 for purchasing a joint outfit to last two years. Scheffler, at the last moment, failed with his contribution and Bird furnished something over $1000. At San Francisco a small steam launch and a scow, 32 feet long by 6 feet beam, were bought, together with the usual supply of food, clothing, etc., for such an undertaking. The party sailed from San Francisco and reached St. Michael on July 4th. Shortly thereafter they started up the Yukon river with their boats, the steam launch towing the scow loaded with their outfit, arranged in the following manner: The scow was 32 feet long and 6 or 7 feet wide in the center and narrowing toward the bow and stern, and was about 3 feet deep. There was a seat across the stern, upon one end of which sat a cook stove. In front of this seat was a vacant space some 2 feet wide, and in one end of this space sat the water barrel. The whole space forward of this was filled with the outfit so arranged or packed that the top was level, and about the height of the sides of the boat. The rear end of this pile of provisions, etc., was sometimes utilized as a seat, the occupants sitting with their feet in the vacant space mentioned and facing the stern. On the starboard side of this seat, on rear end of the provis-

ions, sat the grub box. Just forward of the grub box, on the starboard side, was the bed of Bird and the woman, made down lengthwise the boat. On the other side of the boat, made down in the same manner, was Patterson's bed. Forward of these beds and made down across the boat, side by side, were the beds of Hurlin and Scheffler. On the way up from San Francisco, Patterson and the woman had passed as brother and sister, and Bird and the woman as husband and wife.

Some time early in September the party reached a point on the Yukon river about 600 miles above its mouth and about two miles below a coal mine known as Camp Dewey, and determined to go into winter quarters. For that purpose they began the construction of a cabin. About September 24th the party determined to separate, Scheffler, Patterson and Hurlin going away, leaving Bird and the woman. At the defendant's request, however, they agreed to stay and help finish the cabin. The cabin was finished on the 26th of September and the tradegy occurred on the morning of the 27th.

Up to this point there is no serious conflict in the testimony. But regarding the causes that led up to the fatal difficulty, and the circumstances immediately surrounding the killing, the evidence was sharply conflicting and often squarely contradictory. The only eye-witnesses to the homicide, beside the defendant himself, were Charles Scheffler and Naomi Strong.

The theory of the prosecution, based upon the testimony of these two witnesses, was that the de-

fendant was so quarrelsome and disagreeable that on September 24th the three men, Hurlin, Patterson and Scheffler, determined to leave defendant and the woman. At defendant's request, however, they agreed to stay and help finish the cabin. The cabin was finished on September 26th. In the meantime there had been disagreements about the division of the supplies—Hurlin and Patterson wanting three-fifths for their party, and defendant claiming one-half on the ground that he had paid for one-half. Defendant proposed to leave this matter to arbitration before the coal miners at the camp two miles above, but Hurlin and Patterson refused. This matter had not been adjusted on the morning of the 27th. On that morning the party sat down to breakfast in the following order: Hurlin, Patterson and Scheffler on the rear end of the pile of provisions in the scow, facing the stern of the scow, Hurlin next to the grub box, Scheffler in the middle and Patterson on his right and next the left or port side of the scow. Naomi Strong sat on the seat in the rear of the scow, immediately in front of and facing Hurlin. Defendant sat upon his bed about four feet behind and a little to the left of Hurlin and the other men. While the party were eating breakfast, defendant suddenly and without warning, rose up with his shot gun in his hands, shot and killed Hurlin, the shot taking effect in the back of the head, and shot and seriously wounded Patterson, the shot taking effect from the lower part of the left shoulder blade up to the jaw.

The defendant on the other hand claimed that up

to that morning there had been no serious disagreement. On the 24th, Hurlin, Scheffler and Patterson informed the defendant that they were going off to themselves, build a cabin and chop wood. At defendant's request they agreed to remain and help finish the cabin, which took two days. In the meantime the question of a division of supplies arose. There was only one axe, one stove and one saw. These the three men insisted on taking. On the evening of the 26th the defendant was warned by the woman that Patterson and Hurlin were conspiring to "do him up." On the morning of the 27th Scheffler and Hurlin got up first and went up on the mountain. Bird arose next and after making coffee went up to the cabin. In a short time Scheffler came up and called him down, saying they wanted to divide the provisions. The defendant came down and they were all called into the scow by the woman to breakfast. After breakfast Bird asked Patterson upon what basis they proposed to divide, and he replied in five equal shares. Bird objected to this on the ground that he had paid for one-half, and proposed to refer the matter for settlement to the miners at the camp above. Hurlin and Patterson refused to do this. Bird sat on his bunk and Patterson on his, and they began casting up how much each had paid out. A quarrel ensued. The lie was passed between Patterson and Bird; a blow was struck; the woman called out "look out, Homer, they are getting their guns!" Bird sprang for his gun, which was setting against the water barrel in the stern, and as he got it he saw Hurlin coming up

with his Winchester from under his bed, and he shot and killed him. Patterson was making for his gun in the bow of the boat and had nearly reached it when he shot him with the other barrel (Rec. 111 to 117).

The defendant also introduced the testimony of Judge A. K. Delaney, H. J. Gurr and J. H. Condit, tending to show that it is impossible for the wounds upon Patterson to have been inflicted with a shot gun discharged at a distance from him of only 4 to 6 feet, but that the wounds were such as would likely be produced at a distance of 25 or 30 feet; that if defendant had shot and killed Hurlin in the manner described by the witnesses for the government the woman, sitting in front of him, must necessarily have been wounded or killed also.

It will thus be seen that the main issue to be settled by the jury was as to which witnesses were speaking the truth; if Scheffler and Strong were telling the truth, the defendant was guilty of a cold-blooded murder. If the defendant was telling the truth it was a case of self defence. If one was true the other was necessarily false. This issue it was of the utmost importance to the defendant to have fairly submitted to the jury. In this we think the court failed in two important essentials, which are complained of in the *sixth* and *eighth* assignments of error which will now be presented:

SIXTH ASSIGNMENT OF ERROR.

This assignment (Rec. p. 172) complains of that portion of the court's charge wherein the two theories of the case, the one for the government and the one

for the defence, are outlined and clearly stated. In the instructions the court assumes (what was manifest) that if one statement is true, the other is necessarily false. But the court then tells the jury further: "But in determining this matter, under the evidence before you, you must consider that the situation of the parties at the time and all the surrounding circumstances, together with the evidence of the witnesses for the prosecution, as well as the evidence of the defendant."

The bill of exceptions shows that the charge complained of was given and excepted to (Rec. 150–151). The last clause of the charge, which we have quoted, qualified the whole instruction and permeated it with two errors.

1st. The jury was in effect told that even though they find the story told by the witnesses for the government to be untrue, they must consider their testimony in making up their verdict.

2nd. (And a more serious error.) All the evidence for the defendant, except his own, is in effect withdrawn from the jury in passing upon this all-important issue. The jury are told, not that they must consider all the evidence, but "the evidence of the defendant." Not a word about the testimony of witnesses tending to show that the story of the government witnesses was necessarily false. And this error was emphasized by the refusal of the court to give the charge complained of in

THE EIGHTH ASSIGNMENT OF ERROR.

This assignment complains of the action of the court in refusing to instruct the jury as follows:

"Gentlemen of the jury: In considering the testimony in this case, and determining the credibility of the witnesses, it is your duty to weigh and judge the testimony in the light of the common knowledge and experience of mankind, and to apply such knowledge and experience to the facts testified to. The witnesses for the government testified that the defendant shot the deceased with a shotgun, loaded with large shot, in the back of the head from a distance of not exceeding four feet; that the head of the deceased, at the time the shot was fired, was immediately between the defendant and the witness, Naomi Strong; but that none of the shot struck said witness, but were all stopped by the head of the deceased. It is further testified by the witnesses for the government that the defendant immediately shot and wounded one R. L. Patterson with the other barrel of the shotgun similarly charged with large shot, and that at the moment of such shooting the said Patterson was at a distance of from four to six feet from the muzzle of the gun; that the charge of shot took effect on the body of said Patterson from about the lower point of the shoulder upwards to a point in the left jaw underneath the ear, one coming out of the mouth and another coming out just on the right side of the nose.

"Most men in this country have more or less knowledge and experience of the effect of a shotgun discharged at close range, as to the extent of its penetration, and the extent to which the shot will scatter; and if, in the light of such knowledge and experience as you may have had, as well as the evidence in the

case, you do not believe that the shooting of the deceased occurred in the manner testified to by the witnesses for the government, you should acquit. Or if you have a reasonable doubt as to whether such shooting occurred in that manner, you must give the defendant the benefit of that doubt and acquit him. And in determining whether the shooting of the deceased occurred in the manner claimed by the government or not, it is your duty to consider all the matters testified to in that connection, and the probability or improbability of the shot claimed to have been fired at Patterson scattering at that range to the extent testified to by the government witnesses. And if the story as a whole seems improbable to you, it is sufficient to raise a reasonable doubt as to the defendant's guilt, and you must acquit him." (Rec. p. 174–5.)

(Note—This assignment is erroneously numbered and should be *tenth*, but the reference to the paging of the printed record is correct.)

The bill of exceptions shows (Rec. p. 156) that this instruction was requested by the defendant, refused by the court, and the ruling excepted to. This ruling was complained of on motion for a new trial (p. 164).

This ruling we think erroneous and highly prejudicial to the defendant. The error was one of both commission and omission! As we have already seen in considering the *sixth assignment*, the court limited the jury, in passing upon the case, to a consideration of the defendant's testimony alone—not to the whole

testimony for the defense. We then request a charge covering the omission in the instruction given, and it is refused.

It is elementary law that the defence made must be submitted to the jury under appropriate instructions. Here the court submits to the jury the whole case for the prosecution, viz.: Did the defendant shoot and kill the deceased while the latter was unsuspectingly eating his breakfast, discharging a shotgun into the back of his head, from a distance of three and a half or four feet? The defendant, on the other hand, claimed self defense, and that the shooting took place at a distance from the deceased of twenty-five or thirty feet. Now it was important for the defendant to show that the wounds inflicted were such as could not have been inflicted in the manner testified to by the government witnesses. Their story in the first place is one which, it seems to us, no reasonable man, with a knowledge of the effect a shotgun discharged at close range, could believe. Naomi Strong places Hurlin, at the moment he was shot, directly between herself and the defendant—directly in range of the gun (Rec. p. 94). Yet she was not hurt (Rec. 96–97). The man never yet lived whose head would stop a charge of heavy shot fired from a shotgun at a distance of four feet. Then Patterson's wound extended about eighteen inches up and down, from the lower shoulder blade up to under the jaw (Rec. 58). The shotgun was never yet made that at a distance of four feet would so scatter the shot. The defendant introduced three witnesses—Judge Delaney,

Mr. Gurr and Mr. Condit—the substance of whose testimony was that the wounds on Patterson could not have been inflicted in the manner described, and that Hurlin could not have been killed in the manner described without also wounding Naomi Strong. This testimony, tending strongly to corroborate the defendant, is no where referred to in the instructions, but the jury are told, in passing upon the issue, to "consider the evidence of the witnesses for the prosecution as well as the evidence of the defendant." The evidence of the witnesses named was entirely excluded from the consideration of the jury. (Oliver vs. U. S. 160 U. S., 212.

The *seventh* and *eleventh* assignments relate to the same error and will therefore be presented together.

SEVENTH ASSIGNMENT OF ERROR.

The court erred in instructing the jury as follows:

"Evidence has been offered of the escape of the defendant, or attempted escape, after arrest on the charge on which the defendant is now being tried. This evidence is admitted on the theory that the defendant is in fear of the consequences of his crime and is attempting to escape therefrom; in other words, that guilt may be inferred from the fact of escape from custody. The court instructs you that the inference that may be drawn from an escape is strong or slight according to the facts surrounding the party at the time. If a party is caught in the act of crime and speedily makes an attempt for liberty under desperate circumstances, the inference of guilt

would be strong, but if the attempt was made after many months of confinement and escaped comparatively without danger, then the inference of guilt to be drawn from an escape is slight; but whether the inference of guilt is strong or slight depends upon the conditions and circumstances surrounding the accused person at the time." (Rec. 173)

This charge the court gave over the objections and exceptions of the defendant (Rec. p. 151) and was complained of on the motion for a new trial.

The defendant, on the other hand requested the court to charge the jury as quoted in the

ELEVENTH ASSIGNMENT OF ERROR.

"The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"In this case it has been testified to, on behalf of the government, that the defendant made an attempt to escape while at St. Michaels. This was long after the offence with which he is charged is alleged to have been committed and some months after his arrest. Evidence of attempted escape, or flight, is admitted as tending to establish an inference of guilt on the part of the accused in connection with other evidence. Alone it is insufficient to establish such inference at all. And, in considering it in connection with other evidence, the jury are to carefully remember that there may have been other reasons leading to such attempt to escape besides consciousness of guilt, such as the distance to the place of trial, the natural fear that men have when charged with the commission of a grave crime, however innocent they

may in fact be, the consciousness that witnesses are hostile, or other reasons that might be entirely consistent with innocence."

This charge the defendant requested (Rec. 157) and the court refused.

The point here raised is we think conclusively settled by the case of Starr vs. U. S., 164 U. S., 627, and authorities there cited.

NINTH ASSIGNMENT OF ERROR.

"The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"Gentlemen of the Jury: You are instructed that an accomplice in law means any one who participates, whether as principal or as accessory; and you are further instructed that an accessory is one who is guilty of an offense, not by committing the offense in person or as principal, but by being in some way guiltily concerned therein, as by advising or inciting another to commit a crime, or by concealing the principal offender, or by concealing or aiding the guilty party after having knowledge of his guilt, or helping him to escape punishment. And you are further instructed that you cannot convict upon the uncorroborated testimony of an accomplice, and if you find and believe from the evidence that the witness Scheffler was an accomplice in the killing of the deceased, Hurlin, by the defendant, yet if you find there is no other evidence concerning the defendant with the commission of the crime except the testimony of such

accomplice, or unless the testimony of such accomplice as to the main and material facts constituting the crime are corroborated by other evidence, you cannot find the defendant guilty; but such corroborating evidence must be something more than the mere showing that the crime has been committed and must tend directly to connect the defendant with the act itself and with each and every element that enters into the commission of the crime charged, and unless the testimony of such accomplice is so corroborated, you will acquit.

"Second. You are instructed that the testimony of one accomplice does not corroborate the testimony of another accomplice, and if you find and believe from the evidence that the witnesses for the government, Charles Scheffler and Naomi Strong, were both accomplices in the killing of J. H. Hurlin, the deceased and that their testimony tending to prove the defendant guilty of the crime charged in the indictment is not corroborated by any other evidence, except their own, tending to connect the defendant with such killing, and the killing of the deceased in such manner as would make it a crime, then you must find the defendant not guilty.

"Third. You are instructed that a conviction in this case can not be had upon the testimony of an accomplice, unless such testimony be corroborated by such other evidence as tends to connect the defendant with the commission of the crime; and the corroboration is not sufficient if it merely shows the commission of the crime and the circumstances of the

commission, but such corroboration must go to the extent of corroborating the testimony of the accomplice upon each and every one of the material allegations in the indictment which are necessary to constitute the offence charged, and if you find and believe from the evidence that the witnesses, Charles Scheffler and Naomi Strong, were accomplices in the killing of J. H. Hurlin, if you find he was killed, and that their testimony tending to connect the defendant with such killing, and with such other facts as would make such killing a crime, is not corroborated by other competent evidence, you must acquit. And this corroboration must not be only to the fact of the killing of the deceased, but to the guilty intent and to all the facts and circumstances which would make such killing a crime under the instructions given you by the court."—(Rec. 175–176)

This instruction was requested by the defendant and refused by the court, and the defendant excepted (Rec. 163).

That an accomplice's testimony must be corroborated is settled law in the federal courts, and is expressly required by the Alaska Code. (Carter's Code, Part II §153.)

Whether this charge then was erroneously refused or not, depends upon whether there was any evidence upon which to base it. Let us see: On the very next morning after the homicide, Mr. Thompkins and Mr. Janson came to the cabin and the defendant wanted to surrender himself and tell what had been done; he was prevented by Naomi Strong and Scheffler as well as Patterson (Rec. pp. 61, 62, 98).

Shortly after the shooting, Scheffler and Bird went down to the trading post together, and no report of the matter is made by Scheffler (63, 64). Indeed the testimony shows that for six months after the homicide, the witnesses for the government and defendant lived together in the cabin, and the homicide was never mentioned; if a crime was committed the witnesses for the government concealed it. If Hurlin was murdered on the 27th day of September, 1898, by the defendant, the conduct of the witnesses for the government was such, as disclosed by this record, as to point almost conclusively to their guilty participation in it. They were more fearful than Bird himself that it would be found out and inquired into, when the whole matter was fresh. Their concealment was kept up until Patterson was dead, and these two witnesses, after a time spent alone together in the cabin, had come to "trust each other." A reading of the record, we think, makes it too clear for argument that the instruction regarding accomplice's testimony should have been given.

There are other errors assigned, but we do not deem it necessary to present them, confident that upon those presented the cause must be reversed, and such further order made as to this cause as the court may think proper.

Respectfully submitted,

W. W. DUDLEY and

L. T. MICHENER,

Attorneys for Plaintiff in Error.

MALONY & COBB, of Counsel.

3091

No. 306.

Office Supreme Court U.S.
FILED
OCT 13 1902
JAMES H. MCKENNEY

Br. of Atty. Gen. Asst. Sec. Rob
for D. C.

Filed Oct. 13, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

HOMER BIRD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 306.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

HOMER BIRD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 306.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

BRIEF FOR THE UNITED STATES.

This murder was committed September 27, 1898, at a point on the Yukon River about 600 miles above its mouth (Rec., pp. 1 and 2). The grand jury of Alaska returned an indictment against the defendant on the 9th day of November, 1899. The defendant was tried, convicted, and on December 13, 1899, sentenced to be hanged. On February 25, 1901, the Supreme Court reversed the judgment of said district court and remanded the cause to the said district court with direction to set aside the verdict and award a new trial. A new trial was had in accordance with said mandate, the defendant again convicted, and on March 3, 1902, again sentenced to be hanged.

It appeared from the evidence that the defendant originally came from the city of New Orleans, where,

in March, 1898, he joined with Charles Sheffler, R. L. Patterson, and the deceased, J. H. Hurlin, in a prospecting tour for gold in the Territory of Alaska. The four men each agreed to furnish $500, but Sheffler failed to put up his quota, and Bird furnished about $1,000, and the remainder of it was contributed by Hurlin and Patterson. The party started from San Francisco, and were accompanied by a woman by the name of Naomi Strong, who seems to have been Bird's mistress. The party equipped itself with a small steam launch and a scow with provisions. They sailed from San Francisco May 21, 1898, reached St. Michael in July, and about a week later started for the Yukon River. In September, when they were at a point on the Yukon River, they determined to go into winter quarters. It is apparent from the testimony that during the progress of the journey serious difficulties had arisen between the partners, which were partly due to differences of opinion as to the respective shares of the partners in the joint enterprise and to the quarrelsome disposition of the defendant.

As a result of these differences, Sheffler, Patterson, and Hurlin determined to leave Bird and the woman, but at Bird's request agreed to remain until a cabin, which they were constructing for winter quarters, could be finished.

The tragedy, which occurred on the morning of September 27, is best described by Naomi Strong (Rec., p. 79):

Q. They all got up before you—all of the men—and got away from the boat, did they?

A. Yes, sir; they always got up before I did.

Q. Did Bird get up before you that morning?

A. Yes, sir; he got up.

Q. When they got up, where did they go, if you know?

A. Mr. Patterson and Sheffler and Hurlin went up to cut some timbers to roll the barge off the beach; the barge was on the beach—half of it—and Mr. Bird went up to work on the cabin; the cabin wasn't completed quite, and he went up to work on the cabin, I believe.

Q. What did you do?

A. I was preparing breakfast.

Q. How long was you preparing breakfast, from the time you got up until you called them to breakfast?

A. I don't remember the time; it was 9 or 10 o'clock. It took me about an hour or half an hour till I got things prepared to call them to breakfast.

Q. You had had coffee earlier in the morning?

A. Yes, sir; we always had.

Q. What had you cooked for breakfast?

A. Oatmeal and some bacon, I believe.

Q. When you called them to breakfast, where were these men, Sheffler, Hurlin, and Patterson?

A. They were out working with these timbers.

Q. Were they within calling distance?

A. Yes; but Mr. Bird was up to the cabin.

Q. When you called them what did they do?

A. Mr. Sheffler went up and called Mr. Bird first, I believe, to come down, they were ready

to divide the provisions; and then while they were out talking Mr. Bird took his own time to come down—and while they were out there talking, I called them to breakfast.

Q. When you called them they immediately came on board?

A. I think Sheffler and Patterson came first. I don't remember; then Hurlin and Bird was the last, I believe.

Q. When Bird came in where did he seat himself?

A. On his bed, on the couch—the bunk.

Q. What did he do—what did you see him doing, if anything, on the couch?

A. He was sitting there figuring with a piece of paper.

Q. Did he have anything else there besides papers?

A. Not that I saw.

Q. He was figuring with a paper. Now, when these three men came on board, where did they sit down, or stand up?

A. They sat down.

Q. Where?

A. Back in the stern of the boat; I sat down; Mr. Hurlin and Mr. Patterson and Mr. Sheffler sat down in a row, and I sat opposite of Mr. Hurlin.

* * * * *

Q. Now, when these men took their seats, as I understand it, they were in the order, Patterson on the right, Sheffler in the center, and Hurlin on the left?

A. Yes, sir.

Q. Did you serve them with any food?

A. Yes, sir; I gave them breakfast.

Q. What did you give them?

A. Oatmeal first.

Q. In what kind of a vessel?

A. In a tin plate.

Q. They had oatmeal in the tin plate, did they?

A. Yes, sir.

Q. You say you sat opposite these men?

A. Yes, sir; Sheffler and I were talking about a trap I had set to catch some grouse, and——

Q. Now, what was——

A —— we were talking about it, and all at once I heard Mr. Bird's gun click—shotgun—when he broke it it clicked, of course, and I looked up and he had the gun to his shoulder, and in the meantime Mr. Sheffler looked around; I think he fired at Mr. Hurlin, and then Sheffler looked around and held up his hands and told him for God's sake not to shoot him, and I jumped up after he had fired at Hurlin, and Mr. Patterson kind of jumped back of me—jumped behind me like, and I asked Bird not to shoot; he had the gun to his shoulder all the time, and I jumped and run; put my hands over Patterson's shoulder and run through the boat, and just as I passed him in the boat he fired at Patterson, and Patterson jumped overboard; whether the shot struck him when he jumped overboard I don't know, and in the meantime I jumps out on the beach, and Mr. Patterson jumps overboard, and Mr. Bird comes running out, climbs over the

bow of the boat with two guns in his hands—his own and Mr. Sheffler's—and heads Patterson off; the boat was in the water, just kind of half on the beach and half in the water, and so Mr. Patterson wades around on the side of the boat to get out, and Bird heads him off and tells him not to come near him, and Patterson kept begging him not to shoot him, and Bird up with his own gun again and says: "Bob, you dirty ———, you're the cause of this," and shot at him the second time, and Patterson came to the beach. (Witness breaks down and sobs.)

Q. Well, compose yourself, Mrs. Strong, if you can, and go on and state what occurred there. What happened when Mr. Patterson got to the beach?

A. They were all on the beach then, and he begged Bird not to shoot him.

Q. What did he say to them?

A. He held out his hands and told him for God's sake to think of his poor family.

Q. What did Bird say?

A. I don't remember any more what he did say. I think he said, "Bob, I have thought of our families," or something like that.

Q. At the time he fired at Hurlin did you see what Mr. Hurlin did? Immediately after, as far as Hurlin was concerned—immediately after the shooting of Hurlin—what followed? [Witness sobs.] What did he do, Mrs. Strong?

A. Mr. Hurlin?

Q. Yes.

A. He never moved at all; he sat in the same position when he was shot.

Q. Did his body change position at all?

A. No; just remained that way for quite a while.

Q. Did you see any evidence of a wound on Mr. Hurlin, anything——

A. I saw there was a hole in his head right here, the left side.

Q. What position was his head in?

A. Leaning over this way, with his hands like this, and his plate in his lap.

Q. What did you see in his plate?

A. Blood and brains. [Witness sobs.]

* * * * *

The murder was therefore an inexcusable atrocity, and unless the defendant has been illegally convicted his sentence should stand.

In support of his appeal the appellant has filed 19 assignments of error. Many of these are trivial, and not alluded to by appellant in his brief. In replying to this brief each assignment of error will be considered in the order observed by the appellant, and it will be assumed that those not considered by him have been abandoned.

1.

JURISDICTION OF TRIAL COURT.

The act of Congress of May 17, 1884, entitled "An act providing a civil government for Alaska," established a district court for said district with the civil and criminal jurisdiction of district court of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts and such other jurisdiction,

not inconsistent with this act, as may be established by law. (23 Stat. L., 24).

The crime was committed and the indictment against the defendant found while the above act was in force.

On March 3, 1899, and prior to the first trial in this case, Congress passed "An act to define and punish crimes in the district of Alaska and to provide a code of criminal procedure for said district." (30 Stat. L., 539.) Section 219 of Title One of that act provides "That nothing herein contained shall apply to or in any way effect any proceeding or indictment now found or pending, or that may be found, for any offense committed before the passage of this act." It is conceded by appellant that said act of March 3, 1899, is still in force in said district. He contends, however, that the act of June 6, 1900, entitled "An act making further provision for a civil government for Alaska, and for other purposes" (31 Stat. L., p. 321), in effect deprives the district court of Alaska of jurisdiction of indictments returned into that court prior to the passage of that act; that is, prior to the reorganization of that court under the provisions of said act. He further contends that the district court as reorganized, notwithstanding the provision of section 219 of the criminal code previously quoted, is limited in its jurisdiction in criminal matters to offenses embodied in that code.

If the legislative intent is to govern, then the reorganized district court had jurisdiction of the indictment herein and jurisdiction of all criminal causes

pending at the time of the passage of the civil code. Chapter one of the criminal code provides:

> SEC. 1. That the district of Alaska consists of that portion of the Territory of the United States ceded by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven.
>
> SEC. 2. That the crimes and offenses defined in this act, committed within the district of Alaska, shall be punished as herein provided.

Said Mr. Justice Field, in *Patterson* v. *Tatum* (3 Sawyer, 164),

> The proposition of counsel that a statute is impliedly repealed by a subsequent act revising the whole matter of the first, is undoubtedly correct. The authorities are numerous to that effect. Two cases recently decided by the Supreme Court of the United States, in addition to those cited by counsel, establish this position—that of the *United States* v. *Tynen* (11 Wallace), and that of *Henderson's Tobacco*, in the same volume. But the implication can not arise when the revisory statute itself prescribes its operation upon the previous act; when that is done no other effect can be given to the revisory act, and such was the case in the revisory act of 1846. It repeals such provisions of the original act as were inconsistent with the new act—no other.

Is there anything in the criminal code inconsistent with the provision in section 4 of the civil code conferring upon the reorganized district court general jurisdiction in criminal causes?

We contend that the civil code did not expressly or by implication repeal the criminal code. *All* the provisions of the criminal code still are operative. Any offense committed subsequent to its passage must be prosecuted as therein prescribed. But can it be claimed that an offense committed prior to the passage of that code can not even now be prosecuted under the provisions of law then in force? Are we not to understand that *general* jurisdiction means jurisdiction of all criminal causes and offenses under existing law in the district?

Are we to assume that Congress intended to release all criminals who were being prosecuted when the civil code was enacted? If the district court had no jurisdiction in this cause it had no jurisdiction in any criminal cause pending when the civil code was enacted. The last section of the civil code provides:

> No person shall be deprived of any existing legal right or remedy by reason of the passage of this act, and all civil actions or proceedings commenced in the courts of the district before or within sixty days after the approval of this act may be prosecuted to final judgment under the law now in force in the district, or under this act. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Read this section in connection with section 219 of the criminal code and it is clear that Congress did not deem it necessary in the civil code to refer to criminal causes then pending and entitled in the district court

prior to its reorganization. It was unquestionably the legislative understanding that the civil code in no way affected the criminal code or the criminal causes then pending.

All the cases cited by appellant in support of his contention concern conditions entirely unlike those existing in this case. Here we have a law the object of which as set forth in its title was to make *further* provisions for a *civil* government for Alaska. The Federal authority was not relinquished to a newly created State sovereignty. The Federal court continued to be the sole judicial tribunal therein. To be sure that court was reorganized, but its character and jurisdiction remained the same. It continued to be the district court of Alaska.

It would, indeed, be an anomalous situation if prosecutions for offenses committed either before or subsequent to the enactment of the criminal code and prior to the enactment of the civil code could originate in the reorganized district court, but all criminal causes entitled in the district court prior to the enactment of the civil code should fall for want of jurisdiction.

To admit the existence of such an anomalous situation is to give a strained and unreasonable interpretation to the language used in the act of June 6, 1900—an interpretation not contemplated by Congress.

Appellant comments upon the provisions in the last section of the act of June 6, 1900, that "all civil actions or proceedings commenced in the courts of this district before or within sixty days after the approval

of this act may be prosecuted to final judgment under the law now in force in that district or under this act." Where prosecuted? In what court? Not in the old court, but in the reorganized court. The act made no provision for the transfer of *civil* causes from the old court to the new. It simply provided in effect that inasmuch as the civil procedure of the district was changed by the act, such change should not affect pending civil causes. As the act made no change whatever in the criminal procedure, or in the criminal law of the district, Congress for obvious reasons did not deem a like provision with reference to criminal causes necessary. Appellant, at page 12 of his brief, in discussing the status of criminal causes, says: "The records and files of the old court are not made records and files of the new court." We answer that Congress did not make "the records and files of the old court" in *civil* causes the records and files in the new.

Nor was it necessary, for, as we have before said, a new court in the sense contemplated by appellant had not been created. If, as we have contended, the provisions of section 219 of the criminal code are still in force in the district, this cause has been in no way affected by the act of June 6, 1900, and the trial of defendant was properly had under the law in force prior to the enactment of the criminal code.

2.

SELECTION OF JURY.

It appears by the record "that on the 9th day of November, 1901, and during the Skagway term of

court, Charles D. Rogers, a prominent member of the principal political party opposed to that to which the Hon. W. J. Hills, the clerk of the court, belonged, was by the court appointed a jury commissioner for the Juneau, December, 1901, term of court." Appellant concedes that said jury commissioner was a person properly appointed and qualified to act as such. It also appears in the record (p. 13) that W. J. Hills, clerk of the United States district court for the first division of the district of Alaska, on the 13th and 14th days of November, 1901, "did in connection with Charles D. Rogers, commissioner appointed to select jurors for the Juneau, December, 1901, term of that (this) court, deposit in the jury box the names of three hundred men" believed by them to be qualified jurors for the first division of the district of Alaska. A certificate to that effect was signed by said Hills as clerk of said court and by said jury commissioner Rogers.

Notwithstanding that the record affirmatively shows that all the requirements of the statute were complied with up to the time the three hundred names were placed in the box, we are asked to presume that the words "in connection with" mean in a manner other than the statute prescribed. The proper number of names of jurors were selected at the proper time, by the proper persons, and, unless we assume what the record does not even suggest, in the proper manner.

In criminal cases the same principles of presumption obtain generally, and with the same

> validity, to uphold a judgment of conviction: and where the record shows a plea, in bar, of former conviction, and another of not guilty, the former is presumed waived.
>
> So it will be presumed that a magistrate acting in accordance with the terms of a statute, and that the clerk properly entered the appearance of an accused and indorsed the plea of not guilty, and that the accused was properly arraigned. (Encyclopedia of Pleading and Practice, vol. 2, p. 497.)

In *Ball* v. *United States* (140 U. S., 132) Mr. Chief Justice Fuller said:

> We do not think that the fact of the presence of the prisoners can by fair intendment be collected from the record, no mention being made to that effect in the order, it not appearing therefrom that the sentence was read or orally delivered to them, and the usual question not having been propounded.

In this case the fact that the names of jurors were properly placed in the box "can by fair intendment be collected from the record."

3.

LIST OF WITNESSES.

It is conceded by the defendant that a list of the jury and of the witnesses was seasonably furnished him. He complains, however, because some name other than Noami Strong was not used to designate that witness. The record shows that her maiden name was Noami Strong; that she had been married and divorced, and that after her divorce she resumed her

maiden name. The record further shows that Noami Strong was her true name. (Rec., p. 73.) It shows further that she was known to the defendant under that name when she first met him in New Orleans (p. 74); that she testified under that name in the first trial (p. 73). It is difficult to understand wherein the defendant was injured. The witness was known to him by that name; she had testified under that name at the former trial, and he had had ample time and opportunity to make inquiries concerning her. He had no difficulty in associating the witness with the name by which she was designated in the list of witnesses. In fact, the defendant was inquired of by his counsel, Mr. Maloney (Rec., p. 107), whether he was acquainted with Mrs. Strong, and he answered, "Yes sir."

The Government certainly ought not to be deprived of the testimony of an important witness on the *theory* that the name by which that witness has been known for years is not the true name of the witness. There is absolutely nothing in the record to warrant the assumption of appellant that the name of this witness was not Naomi Strong.

4.

SIXTH ASSIGNMENT OF ERROR.

After presenting to the jury the two theories of the case, that for the Government and that for the defendant, the court said (Rec., p. 151):

> But in determining this matter under the *evidence* before you, you must consider the situation of the parties at the time, and all the

> surrounding circumstances, together with the testimony of the witnesses for the prosecution, as well as the *evidence* of the defendant.

The whole testimony in the case is first referred to by the court in this portion of his charge to the jury as "the *evidence* before you." He, in effect, tells the jury to consider *all* the evidence and *all* the surrounding circumstances in reaching their verdict. No jury of ordinary intelligence could have been misled because the court, after speaking of all the testimony in the case as *evidence*, alluded to the *testimony* of witnesses for the prosecution and the *evidence* of the defendant.

5.

THE EIGHTH ASSIGNMENT OF ERROR

Relates to the refusal of the court to instruct the jury as therein requested by the defendant. Appellant is clearly wrong in his premise that the court in effect excluded from the jury the testimony of Delaney, Gurr, and Condit, witnesses for the defense, who answered certain hypothetical questions concerning the effect of gunshot wounds. The court's instructions to the jury covered every essential element in this request, and was entirely fair and could not have misled the jury. The request assumed that the shot in the charge fired at Hurlin "were all stopped by the head of the deceased," an assumption not warranted by the evidence. This was, of course, known to the court.

Noami Strong under cross-examination testified as follows (Rec., p. 97):

> Q. Did any of the missiles from the shot—the first one—strike you at all?

A No; it didn't strike me at all.

Q. Did it strike any place in the back part of the boat?

A. There was some shot; Mr. Bird found a shot in my cup; two, I think, and more on the floor.

Q. How do you know?

A. He gave them to me.

Q. How do you know he found them?

A. I saw him when he picked them up.

This statement was not denied by the defendant in his testimony. In view of the theoretical and conflicting testimony of these three witnesses for the defendant, met as it was by the positive and uncontradicted statement of Mrs. Strong and the evidence introduced in rebuttal, the court properly declined this request of the defendant.

6.

ESCAPE OF DEFENDANT.

When the Government offered to prove the escape, the following issued (Rec., p. 104):

Q. Did anything occur during his confinement there with reference—that is, with reference to Bird?

A. Yes, sir.

Q. Out of the ordinary?

A. Yes, sir; he made his escape.

(Counsel for the defendant object to the testimony on the ground that it is too remote for the occurrence in question, and there are too many intervening causes to make it material.)

Q. I will withdraw that question for the moment, and I will ask a preliminary question: Under what charge was he committed to your care?

A. On the charge of murder.

Q. The charge on which he is being tried?

A. Yes, sir.

Q. Now, then, how long after you had confined him in this jail, and had him in custody, was it before this jail break was made?

(Counsel for the defendant object to any evidence being introduced on that point, because it is too remote from the occurrence which is alleged to have been committed and the time the arrest was made, and there may be a great many intervening causes for the escape, if it was effected.)

By the COURT. I quite often agree with counsel on matters of this kind, but I can not agree with his views now. The time that had expired and the circumstances surrounding the parties may indeed affect the weight or value of such testimony; but it does not affect its relevancy, materiality, or competency for whatever it may be worth. Of that the jurors are the judges. That is at least my view of the question, and the objection is overruled.

(Exception.)

Q. How long had he been in confinement before the jail delivery was effected?

A. A little over three months. He was confined between the 15th of June and sometime along about the 1st of July he was turned over to me, and he escaped the 1st day of October, and was gone three days.

The language employed by the court upon the subject of the escape of the defendant, considered in connection with the evidence of the escape and the remarks of the court when that evidence was offered, was certainly less open to objection than the language of the court in discussing a like subject in *Allen* v. *United States* (164 U. S., 498), which this court upheld.

The escape of the defendant "*was* made after many months of confinement and escape comparatively without danger." Surely the charge, under the circumstances, could not have misled the jury.

7.

ACCOMPLICE.

The ninth assignment of error relates to the refusal of the court to instruct the jury on the subject of accomplices. Appellant up to this point has proceeded on the theory adopted by the Government that this trial was properly held under the law in force prior to the enactment of the criminal code. He now discovers that under the provisions of section 153 of Title Two of that code the testimony of an accomplice must be corroborated, and he immediately, and at the risk of being inconsistent, invokes the aid of that section. We contend that under section 219 of Title One of the criminal code this trial was in no way affected by the provisions of said section 153. If this contention is correct we are governed by the rule of the common law.

At common law a conviction may be had upon the uncorroborated testimony of an accomplice.

> Am. & Eng. Ency. of Law (2d ed.), vol. 1, 399–401; 1 Phil. Ev., 89; 1 Greenl. Ev., s. 380; 1 Bish. Cr. Proc., s. 1169; 1 Chit. Cr. L., 604; Underhill on Criminal Evidence, p. 90. "It has always been held that a jury might, if they saw fit, convict on the uncorroborated testimony of an accomplice." (Gray, C. J., in *Commonwealth* v. *Holmes*, 127 Mass., 429.) "There is no rule of the common law nor of the statute law of this State that a person shall not be convicted on the testimony of an accomplice unless corroborated by other evidence." (*State* v. *Dana*, 59 Vt., 614.) "In *State* v. *Hang*, 2 Dev., 7 Bat., 390, the supreme court of North Carolina declared what we understand to be the true rule upon the subject. The practice of giving such instruction or advice to the jury, it is there said, rests in the discretion of the presiding judge, and his refusal so to do is not assignable as error." (*Cheatham* v. *The State*, 67 Mississippi, 344.)

Assuming that the provisions of section 153 of the criminal code were operative in this trial, we contend that there was absolutely no evidence in this case upon which to predicate the charge prayed for. If we adopt the story of the defendant himself, neither Mrs. Strong nor Sheffler knew that this murder was to be committed. It is not claimed by defendant that either took any part in its commission. The defendant even admits that immediately after the shooting of Hurlin

and Patterson, Sheffler "went down on his knees" to him. (Rec., p. 118.) From all the testimony it is perfectly clear that Sheffler was in great fear that the defendant would kill him also. In fact the defendant says (Rec., p. 118) he told Sheffler that he (Sheffler) "was as deep in the mud as the others were in the mire." Sheffler then had every reason to believe that he was liable at the hands of the defendant to meet the same fate that had befallen his companions. He was in a strange and unsettled country, without money and without friends, in an extremely dangerous situation, and far from the protecting arm of the law. Can we say that he was not entirely justified in not openly proclaiming the guilt of the defendant until such time as his own danger was less imminent? There is not a scintilla of evidence that either Mrs. Strong or Sheffler concealed this crime. The evidence does show that they proclaimed it as soon as their own safety permitted.

The most appellant claims from the evidence is that Mrs. Strong and Sheffler were tardy in proclaiming the commission of his crime. Assuming that they might without great danger to themselves have sooner procured the arrest of the defendant, their failure to do so certainly did not constitute them accomplices, for "An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime." (Wharton's Criminal Law, par. 440.) "One who is merely present at the commission of a crime, but in no way aids

or participates therein, is not an accomplice." (Am. and Eng. Ency. of Law, 2d ed., vol. 1, p. 391; *Allen* v. *State*, 74 Ga., 769; *Lowery* v. *State*, 72 Ga., 649; *State* v. *Reader*, 60 Iowa, 527; *State* v. *Cox*, 65 Mo., 29.) Concealment of the fact that a felony has been committed does not render one an accomplice. (*Noftsinger* v. *State*, 7 Tex. App., 301; *Rucker* v. *State*, 7 Tex. App., 549.)

The denial of this prayer was not error.

The record herein discloses the commission of a most brutal murder, absolutely devoid of an extenuating circumstance. The defendant has been twice convicted, and unless there has been such error as to clearly injure him he should suffer the penalty for his crime.

Respectfully submitted.

JAMES M. BECK,
Assistant Attorney-General.

CHAS. H. ROBB,
Of Counsel.

O

Supreme Court of the United States.

No. 306.—October Term, 1902.

Homer Bird, Plaintiff in Error, vs. The United States. } In error to the District Court of the United States for the District of Alaska.

[November 17, 1902.]

Mr. Justice McKenna delivered the opinion of the Court.

Homer Bird was found guilty of the crime of murder and was sentenced to death. On appeal to this court the judgment and sentence were reversed and the case remanded for a new trial. (180 U. S. 356.)

A new trial was had resulting again in the conviction of Bird for murder, and a sentence of death by hanging was pronounced against him. To this judgment and sentence this writ of error is directed.

After the first trial and while the case was pending in this court, that is, on March 3, 1899, Congress passed a criminal code and code of civil procedure for Alaska, entitled "An act to define and punish crimes in the District of Alaska, and to provide a code of criminal procedure for said district." It went into effect July 1, 1899.

On June 6, 1900, Congress passed another act for Alaska, entitled "An act making further provision for a civil government for Alaska, and for other purposes." (31 Stat. 321.)

Plaintiff in error, contending that these acts deprived the court of jurisdiction, when the case was called for trial, moved the court to strike the cause from the docket and order him discharged: (1) because the court had no jurisdiction of the crime charged; (2) because the court had no jurisdiction of the case. The motion was denied. It was renewed again in arrest of judgment, and the grounds of it specifically alleged as follows:

"I. Because there has never been any plea entered in this court by the defendant, the only plea ever made by him being in the District Court for Alaska, established by the act of Congress of May 17, 1884, which was abolished by the act of Congress of June 6, 1900.

"II. Because the court has no jurisdiction of this cause, the indictment herein having been returned into the District Court for Alaska, established by the act of Congress of May 17, 1884, and not into this court, and there is no law conferring upon this court jurisdiction over indictments returned into said court.

"III. Because this court has no jurisdiction of the offense charged in the indictment herein, in this: The said indictment charges an offense under section 5339 of the Revised Statutes of the United States, while this court has no jurisdiction of crimes except as defined in the criminal code for Alaska."

The motion was denied and an exception was taken. This ruling constitutes the first assignment of error.

1. The act of 1884 provided a civil government for Alaska, and by section 3 it was enacted as follows:

"That there shall be, and hereby is, established a District Court for said district with the civil and criminal jurisdiction of District Courts of the United States, and the civil and criminal jurisdiction of District Courts of the United States, exercising the jurisdiction of Circuit Courts, and such other jurisdiction, not inconsistent with this act, as may be established by law; and a district judge shall be appointed for said district, who shall, during his term of office, reside therein and hold at least two terms of said court therein in each year, one at Sitka, beginning on the first Monday in May, and the other at Wrangel, beginning on the first Monday in November."

By section 7 it was provided:

"That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

It was under this law that plaintiff in error was indicted and tried the first time.

The act of March 3, 1899, defined the crime of homicide, and divided it into murder in the first and second degrees, and manslaughter. The act contained a clause, it is conceded, saving the jurisdiction of the court over prior cases and crimes. And it is also conceded that the act is still in force, but it is urged that it has no bearing on the questions presented. It is contended that the act of 1884 was entirely repealed and superseded by the act of June 6, 1900, "both by express enactment and by necessary implication;" that "the District Court for Alaska created by the act of May 17, 1884, was abolished by the act of June 6, 1900, and an entirely new court created;" and it is hence asserted "that in the absence of a provision in the latter act, transferring criminal causes pending in the old court to the new, the latter had no jurisdiction of indictments returned into the old court;" that "a statute conferring upon a court 'general' jurisdiction in criminal matters, must be construed to refer to and to be limited by the code of criminal law enacted for the territory, and does not include jurisdiction of any offense not embodied in the code."

The act of 1884, we have seen, established the District Court for Alaska "with the civil and criminal jurisdiction of District Courts of the United States, and the civil and criminal jurisdiction of District Courts of the United States exercising the jurisdiction of Circuit Courts." It also provided for the appointment of a district judge, a governor and other officers. It made provision, as declared in its title, for a civil government in Alaska.

The act of June 6, 1900, is entitled "An act making further provision for the District of Alaska, and for other purposes." It provides for a governor and other officers, and its provisions for a court are as follows:

"There is hereby established a District Court for the district, which shall be a court of general jurisdiction in civil, criminal, equity and admiralty causes; and three district judges shall be appointed for the district, who shall, during their terms of office, reside in the divisions of the district to which they may be respectively assigned by the President.

"The court shall consist of three divisions. The judge designated to preside over the division numbered one shall, during his term of office, reside at Juneau, and shall hold at least four terms of court in the district each year, two at Juneau and two at Skagway, and the judge shall, as near January 1 as practicable, designate the time of holding the terms during the current year.

"The judge designated to preside over division numbered two shall reside at St. Michaels during his term of office, and shall hold at least one term of court each year at St. Michaels, in the district, beginning the third Monday in June.

"The judge designated to preside over division numbered three shall reside at Eagle City during his term of office, and shall hold at least one term of court each year at Eagle City, in the district, beginning the first Monday in July."

Section 5 declares the jurisdiction of each division of the court to extend over the whole district, and provides for a change of venue from one division or place to another. The act further empowers the judges to appoint their own clerks, commissioners, &c.

Section 10 provides that the "judges (and other officers) provided for in this act shall be appointed by the President, by and with the advice and consent of the Senate," &c., and a salary of $5,000 is provided instead of $3,000, as under the old law.

Section 25 provides that "the officers properly qualified and actually discharging official duties in the district at the time of the approval of this act may continue to act in their respective official capacities until the expiration of the term for which they were respectively appointed unless sooner removed." And it is provided in section 368 as follows:

"No person shall be deprived of any existing legal right or remedy by reason of the passage of this act, and all civil actions or proceedings commenced in the courts of the district before it within sixty days after the approval of this act may be prosecuted to final judgment under the law now in force in the district or under this act. All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

It is upon these provisions that counsel for plaintiff in error rest the contentions which we have quoted. The principal contention is that the District Court for Alaska created by the act of May 17, 1884, was abolished by the act of June 6, 1900, and an entirely new court created. The contention is supported with ability, but we do not think that it is

necessary to decide it on this record. That Congress did not intend by the act of June, 1900, to affect the prosecution of prior offenses is manifest from the act of March 3, 1899, *supra.* (30 Stat. 1285.) This act, though passed prior to the act of June, 1900, constituted, with the latter act, a part of the scheme of government for Alaska. By the act March 3, 1899, it is provided "that nothing herein contained shall apply to, or in any way affect, any proceeding or indictment now found or being, or that may be found, for any offense committed before the passage of this act (section 219)." The act was in force at the time of the passage of the act of June, 1900. It constituted then and constitutes now the code of criminal law enacted for the Territory, and the crimes there defined constitute the criminal causes of which the District Court, by the act of June, 1900, is given "general" jurisdiction. Necessarily therefore not only the criminal causes subsequent to the act of 1899, but the criminal causes saved by it, are covered by its provisions. In other words, the tribunal provided by the act of 1900, whether it is newly created or an existing one continued, has jurisdiction of all the criminal causes embraced by the provisions of the act of March 3, 1899. And it makes no difference that the records and files "of the old court" are not made records and files "of the new court." They must be considered as made, as the means of exercising the jurisdiction conferred. It being the intent of Congress to save "any proceeding or indictment" found or pending "for any offense committed before the passage" of the act of 1899 in construing the act of 1900, "some degree of implication may be called in to aid that intent." (6 Cranch, 314.) There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience.

We find nothing in the cases cited by plaintiff in error to defeat our conclusion. In *McNulty* v. *Batty et al.*, (10 How. 72,) there was a transfer of sovereignty; a Territory became a State, and it was held "the territorial government ceased to exist and all of the authority under it, including the laws organizing its courts of justice, and providing for the revision of their judgments in this court (Supreme Court of the United States) by appeals or writs of error." All that is material in *Freeborn* v. *Smith*, (2 Wall. 160,) depends upon the same consideration. In *Insurance Co.* v. *Ritchie*, (5 Wall. 541,) it was decided that the act of 1833, which gave the citizens of a State the right to sue citizens of the same State in the courts of the United States, for causes arising under the revenue laws, was repealed by a subsequent statute, and that therefore the national courts had no longer jurisdiction of such causes. In other words, it was held that, as the jurisdiction depended upon the statute, it was taken away by the repeal of the statute. *Ex parte McCardle*, (7 Wall. 506;) *Assessors* v. *Osborne*, (9 Wall. 567;) *Railroad Co.* v. *Grant*, (98 U. S. 398,) and *United States* v. *Tynen*, (11 Wall.

88,) were to the same effect. In the latter case there was not an express repeal of the prior statute, but it was decided that the latter act effected such repeal upon the principle that if two acts are "repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." This principle plaintiff in error relies on and urges that it was recently asserted and applied in *Murphy* v. *Utter*, (186 U. S. 95.) The principle is not pertinent in the view we take of the statutes.

2. One of the witnesses for the prosecution was a woman. She was was designated on the indictment by the name of Naomi Strong. It was contended that Naomi Strong was not her name, and plaintiff in error objected to her testimony on the ground that her true name had not been furnished on the list of witnesses given. The objection was overruled and the ruling is assigned as error. At the request of the plaintiff in error the jury was withdrawn and the witness examined before the court as to her name, and she testified that her maiden name was Naomi Strong, but she had been married and divorced. She refused to give the name of her husband. She also testified that she had been divorced ten or twelve years, and upon her divorce she went by her maiden name. Subsequently she went by the name of Byers, when living with a man by that name, and, after meeting the plaintiff in error, she went by his name. She testified that she met the plaintiff in error in 1893 or 1894, and left New Orleans with him the 1st of May, 1898, to join the expedition to Alaska during which the homicide was committed. She and plaintiff in error travelled as husband and wife under the name of Mr. and Mrs. Bundick.

The ruling of the court was right. Section 1033 of the Revised Statutes of the United States requires that in a capital case the list of the witnesses and jurors shall be delivered to the defendant at least two entire days before the trial. By list of the witnesses means a list containing the names of the witnesses, and necessarily this means the names which they then bear and which identifies them. The purpose of the statute is to point out to the defendant the person who may testify against him, and that is best accomplished by the name the witness bears at the time, and not some name that such witness may have had at some prior time. The present case demonstrates the sense of this. It does not appear how long the witness had been married, and to have designated her by her married name might have conveyed no information about her. A question could be raised whether the objection to the witness was made in time. (*Logan* v. *United States*, 144 U. S. 363.)

3. There are errors assigned on the instructions given or refused, and for their understanding an outline of the facts is necessary.

In the spring of 1898 the plaintiff in error, Hurlin, the deceased, Charles Scheffler, R. S. Patterson and Naomi Strong, organized a party to prospect in Alaska for gold. Each of the men was to contribute five hundred dollars for purchasing an outfit. Scheffler failed with his contribution, and plaintiff in error furnished something over one thousand dollars. At San Francisco, California, a small steam launch and a scow thirty-two feet long by six feet beam were bought, together with the usual supply of food, clothing, &c.

The party sailed from San Francisco and reached St. Michael, July 4. Shortly after they started up the Yukon River, reaching a point in September about six hundred miles above its mouth, and there determined to go into winter quarters, and for that purpose began the construction of a cabin. Dissensions arose in the party, and the plaintiff in error and the rest of the party do not agree in their testimony as to who was in fault. A resolution to separate was formed, but its execution was postponed at the request of the plaintiff in error until the cabin should be finished. The cabin was finished on September 26. In the meantime there had been disagreements as to the division of supplies. The homicide occurred on the morning of the 27th of September. The witnesses for the prosecution substantially agree that the party collected for breakfast on that morning—Patterson, Hurlin and Scheffler going first, the plaintiff in error subsequently joining them, he seating himself on his bunk back of the others, and they sat as follows: Patterson on the right, Scheffler in the center and Hurlin on the left.

We may quote from the testimony of the woman. Her statement was substantially corroborated by the others; their statements only varied in some details or differences which arose from their different positions.

"Scheffler and I were talking about a trap I had set to catch some grouse, and——— . . . A.———we were talking about it, and all at once I heard Mr. Bird's gun click—shotgun—when he broke it it clicked, of course, and I looked up and he had the gun to his shoulder, and in the meantime Mr. Scheffler looked around; I think he fired at Mr. Hurlin, and then Scheffler looked around and held up his hands and told him for God's sake not to shoot him, and I jumped up after he fired at Hurlin, and Mr. Patterson kind of jumped back of me—jumped behind me like, and I asked Bird not to shoot; he had the gun to his shoulder all the time, and I jumped and run; put my head over Patterson's shoulder and run through the boat, and just as I passed him in the boat he fired at Mr. Patterson, and Patterson jumped overboard; whether the shot struck him when he jumped overboard I don't know, and in the meantime I jumps out on the beach, and Mr. Patterson jumps overboard, and Mr. Bird comes running out, climbs over the bow of the boat with two guns in his hand—his own and Mr. Scheffler's—and heads Patterson off; the boat was in the water just

kind of half on the beach and half in the water, and so Mr. Patterson wades around on the side of the boat to get out, and Bird heads him off and tells him not to come near him, and Patterson kept begging him not to shoot him, and Bird up with his gun again and says, 'Bob, you dirty son of a bitch, you're the cause of this,' and shot at him the second time and Patterson came to the beach.

"Q. Well, compose yourself, Mrs. Strong, if you can, and go on and state what occurred there. What happened when Mr. Patterson got to the beach?—A. They were all on the beach then, and he begged Bird not to shoot him.

"Q. What did he say to him?—A. He held out his hands and told him for God's sake to think of his poor family.

"Q. What did Bird say?—A. I don't remember any more what he did say; I think he says, 'Bob, I have thought of our families,' or something like that.

"Q. At the time he fired at Hurlin, did you see what Mr. Hurlin did? Immediately after, as far Hurlin was concerned? Immediately after the shooting of Hurlin, what followed [witness sobs]; what did he do, Mrs. Strong?—A. Mr. Hurlin?

"Q. Yes.—A. He never moved at at all; he sat in the same position when he was shot.

"Q. Did his body change position at all?—A. No; just remained that way for quite a while.

"Q. Did you see any evidence of a wound on Mr. Hurlin, anything?—A. I saw where there was a hole in his head right here, the left side."

The plaintiff in error claimed to have acted in self-defense. His testimony will be given hereafter in connection with an instruction to which it is more particularly pertinent.

In view of the testimony error is based upon the following instruction given by the trial court:

"In this connection you may consider whether the gun of the defendant was placed at a point near his bed as stated by the witnesses for the prosecution, and whether the defendant took his gun from the point where it was described to have been placed by the witnesses for the prosecution, and whether, without any act on the part of the deceased or either of those sitting near him, he maliciously from behind the backs of these men, when no attack was made against him in any way, wilfully and maliciously shot the deceased, Hurlin, in the back and side of the head, thereby taking his life; or, whether the statement of the defendant is true, that a quarrel ensued between himself and Patterson while discussing their accounts; that blows passed between them, and that after hearing the witness Naomi Strong say, 'They are getting their guns,' if he did hear any such thing and if you so find—whether he sprang down to a point near the water barrel and there seized his gun and immediately raising the same shot Hurlin while he, the said Hurlin, was in the act of attempting to draw a gun from his sleeping bag; and if all of that was true as the defendant states, whether he was under the necessity of immediately shooting and killing the said Hurlin in order to protect his own life, or if, as the situation then appeared to him, such necessity of immediately shooting Hurlin in order to save his own life existed.

"If you find from the evidence that the statements of defendant Bird in these respects are true, and that the statement of the witnesses of the prosecution are not true, and that the defendant Bird shot and killed the said Hurlin under circumstances as they then appeared to him necessary for the protection of his own life, then you should find him not guilty. But if you should further find that the statement of the defendant Bird is true as to the acts of the said Hurlin as to obtaining his own gun in the manner he described, and yet the apparent danger was not such as to make it necessary or apparently necessary for him to kill the deceased Hurlin, without giving him any warning—if you find he gave him no warning—and without calling upon him, the said Hurlin, to desist in his efforts to obtain his gun, and that the defendant under such circumstances shot and killed the deceased Hurlin, without apparent necessity therefor in order to preserve his own life, then you should find the defendant guilty of manslaughter at least.

"But in determining this matter, under the evidence before you, you must consider that the situation of the parties at the time and all the surrounding circumstances, together with the testimony of the witnesses for the prosecution, as well as the evidence of the defendant."

The contention of the plaintiff in error is that the last paragraph "qualified the whole instruction and permeated it with two errors;" because it was in effect declared that even if the testimony of the witnesses for the government were untrue it was to be considered in determining the verdict; and because all of the evidence of the defendant (plaintiff in error) was withdrawn from the jury in passing on the issue of self-defense. The instruction is not open to this criticism when considered in connection with other instructions. The rule as to the credibility of witnesses was given in other instructions, and did not have to accompany every ruling, and the jury were instructed that it was their duty "to consider the whole evidence and render a verdict in accordance with the facts proved upon the trial." The injunction was not limited by the paragraph complained of by plaintiff in error. That was preceded by the following:

"In considering whether the killing in this case was justifiable or excusable on the ground of self-defense, the jury should consider all the circumstances attending the killing, the conduct of the parties at the time and shortly prior thereto, and their respective situations at the time. *You should determine from the evidence in this case whether the several parties were situated at the time of the killing as described by the witness for the prosecution or described by the defendant himself.*"

The italics are ours, and manifestly the injunction was to determine from the whole evidence "the respective situations" of the "several parties." And the same injunction was expressed in the concluding paragraph of the instruction. This view makes it unnecessary to consider at length the instruction requested by plaintiff in error, the refusal of which constitutes the eighth assignment of error. It selected and gave certain testimony prominence and attempted to make it determinative of a reasonable doubt

of the guilt of the plaintiff in error. If we could concede the correctness of such an instruction the refusal cannot be claimed as error, if the whole case was submitted to the jury, and we think it was.

4. The seventh assignment of error is based upon the following instructions:

"Evidence has been offered of the escape of the defendant, or attempted escape, after arrest on the charge on which the defendant is now being tried. This evidence is admitted on the theory that the defendant is in fear of the consequences of his crime and is attempting to escape therefrom; in other words, that guilt may be inferred from the fact of escape from custody. The court instructs you that the inference that may be drawn from an escape is strong or slight according to the facts surrounding the party at the time. If a party is caught in the act of crime and speedily makes an attempt for liberty under desperate circumstances, the inference of guilt would be strong, but if the attempt was made after many months of confinement and escapes comparatively without danger, then the inference of guilt to be drawn from an escape is slight; but whether the inference of guilt is strong or slight depends upon the conditions and circumstances surrounding the accused person at the time."

There was no error in the instruction. It submitted to the jury the attempt to escape as a fact to be considered, not as determinative of guilt, and *Allen* v. *United States*, (164 U. S. 492,) applies, and not *Starr* v. *United States*, (Id. 627.) Indeed when the state of the record is considered the charge given was as favorable to the accused as the law warranted. The only testimony on the subject of flight related to an escape made by the prisoner in October following his arrest in June. This testimony was objected to not because proof of flight was *per se* inadmissible, but solely on the ground that the escape in question was too remote from the commission of the offense charged and the arrest and imprisonment of the accused to be entitled to go to the jury. The court overruled the objection on the ground that it went to the force of the evidence and not to its admissibility. When therefore the court charged the jury that an attempt to escape "made after many months of confinement" and "comparatively without danger" tended only slightly to prove guilt, we think the instruction was not amenable to the criticism made of it. In view of the instruction which the court gave, as just stated, we think the court committed no error in not giving a more elaborate instruction on the subject of flight which was asked by the accused. Everything in the charge asked as applied to the case was embraced in the charge given.

5. The plaintiff in error requested the court to give instruction which defined principal and accessory—expressed the legal value of the testimony of an accomplice and the necessity of its corroboration to justify a conviction, and submitted to the jury to determine whether Charles Scheffler and Naomi Strong were or were not the accomplices of plaintiff

in error in the killing of Hurlin. Assuming without deciding that the instruction requested expressed the law correctly, it was nevertheless rightly refused, because there were no facts in the case to justify it. The plaintiff in error testified and claimed to have killed Hurlin in self-defense. His version of the controversy which preceded the homicide was as follows:

"I says to him, [Patterson] 'You fellows are nothing but a pack of thieves; you made ten per cent. on them bills in Frisco,' and Patterson says 'You're a liar;' I says, 'You're another,' and with that we dug into each other.

"Q. And what happened?—A. He struck me and I struck him.

"Q. Where did you strike him?—A. In the eye, and I knocked him off the sacks and he fell down, and with that Naomi hollers, 'Look out, Homer, they're getting their guns.' Hurlin was coming up with his gun under his sleeping bag, one end of it this way. I shot Hurlin, and Patterson ran to the bow of the boat; he had to stoop like that, and he jumped for his gun and as he did so, I shot him.

"Q. Come to this map and point out just where you were when you shot at Hurlin.—A. I was in here; I jumped down here and got the gun and stood right about here; Scheffler and the woman was here.

"Q. Where was Hurlin?—A. Hurlin was here, reaching for his gun under the sleeping bags, and had it under his knee like this way.

"Q. And where was Patterson?—A. He was jumping from here over against the edge like—you see the rifle was right in here. I had seen that gun there before, for Scheffler had it out and brought in and set it down there. He was going for that."

It is hardly necessary to point out that this testimony shows the woman to have been an innocent spectator of the fray, and if Scheffler had any guilty connection with what transpired it was not as the accomplice of plaintiff in error. Nor did he become an accomplice by not disclosing the homicide until some time afterward.

We find no error in the other rulings objected to nor do they require particular review.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

No. Orig. 306

Motion to advance.

Office Supreme Court U. S.
FILED
APR 18 1902
JAMES H. McKENNEY,
Clerk.

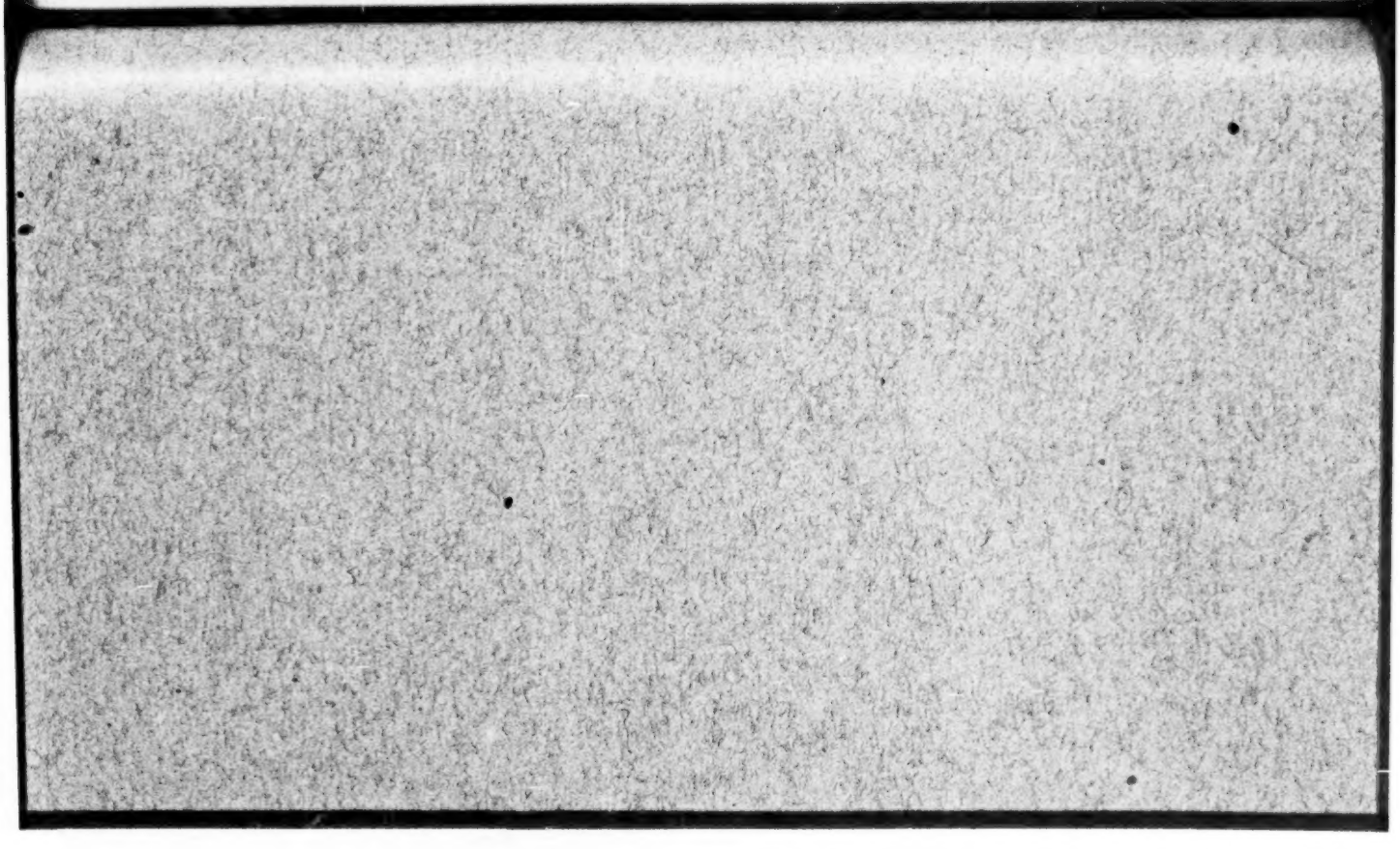
Filed Apr. 18, 1902.

In the Supreme Court of the United States.

HOMER BIRD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 645.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

MOTION TO ADVANCE.



In the Supreme Court of the United States.

HOMER BIRD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 645.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

MOTION TO ADVANCE.

Comes now the Solicitor-General on behalf of the United States in the above-entitled cause and moves the court to advance it on the docket for hearing on the very earliest practicable day.

The case is an indictment for murder committed in Alaska, and has once before been adjudicated by this court (180 U. S., 356). Bird has again been tried, and on December 24 last was found guilty of murder and sentenced to be hanged. Obviously, there ought to be no unnecessary delay in disposing of this case. I am afraid the necessary delay incident to disposing of capital cases coming from Alaska may bring the administration of justice there into disrepute. The temptation to counsel for defense to send capital cases here for purposes of delay merely, is, I imagine, strong.

JOHN K. RICHARDS,
Solicitor-General.

O

22868—02